SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 137

UNITED STATES OF AMERICA, PETITIONER,

vs.

WILLIAM J. BROSNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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A IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN, and MOUNTAIN ENGINEERING COMPANY, APPELLEES

On Appeal from the Judgment of the United States District Court for the Western District of Pennsylvania

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Appendix B to Appellant's Brief—Filed October 23, 1958

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15973

UNITED STATES OF AMERICA

vs.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN, and MOUNTAIN ENGINEERING COMPANY

Docket Entries

Date 1957	
July 12	Complaint filed.
July 12	Summons issued.
July 30	Summons returned served 7/15/57 on defts. George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Co. and Wm. J. Brosnan; served on Francis H. Jacob 7/23/57; on Mrs. Martha M. Berg 7/22/57.
July 30	Answer of Martha M. Berg to complaint filed.
Aug. 2	Answer of George H. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company, led with acceptance of service thereon by counsel for pltf. and counsel for William J. Brosnan, Francis H. Jacob and Martha M. Berg.
Aug. 5	Answer of Francis H. Jacob, deft. filed with acceptance of service of within answer and notice to plead to new matter by counsel for pltf. and notice to plead to new matter by counsel for pltf. and counsel for the Parkmans and Mountain Engineering Co. affixed thereto.

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Aug. 5 Answer of William J. Brosnan, Deft. filed with acceptance of service of within answer and notice to plead to new matter by counsel for pltf. and counsel for the Parkmans and Mountain Engineering Co. affixed thereto.

Dec. 19 Petition of Martha M. Berg for Dismissal of action as to her filed and Order of Willson, J., signed January 3, 1958, entered that as the Petitioner has no interest and will claim no interest in the real estate involved herein, that Martha M. Berg be dismissed as a party defendant in this case.

1958

Jan. 6 Pursuant to Order of Willson, J. entered 1/3/58, Martha M. Berg is hereby dismissed as a party defendant in this case.

JAMES H. WALLACE, JR., *Clerk*

Jan. 6 Notices mailed.

Jan. 22 Non Jury Trial held before Willson, J. and concluded C.A.V. Trial memo filed.

Jan. 23 Subpoena to Leonard H. McMillen, Deputy Sheriff in charge of Real Estate Sales, Sheriff's Office, Allegheny County, Pittsburgh, Pa. returned served Jan. 21, 1958.

Jan. 23 Order entered fixing time for oral argument on Mar. 6, 1958 at 2:00 P. M. before Willson, J.

Mar. 5 Order entered continuing argument to March 26, 1958 at 9:30 A.M.

Mar. 21 Transcript of proceedings on non-jury trial held 1/22/58 at Pgh., Pa. before Willson, J. filed.

Mar. 26 Hearing on Redemption after Sheriff Sale begun before Willson, J. and concluded C.A.V. Trial memo filed.

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Apr. 29	Opinion and Order of Willson, J. entered directing judgment be entered in favor of the defendants and against the plaintiff and that the complaint and civil action number be dismissed.
May 1	Pursuant to Order, Judgment is hereby entered in favor of the defendants and against the plaintiff and the Complaint and Civil Action Number are hereby dismissed.
	JAMES H. WALLACE, JR., *Clerk*
May 1	Notices mailed.
June 30	Notice of appeal filed by U. S.
July 1	Copies of notices mailed U. S. Court of Appeals and counsel for defts.; letters to U. S. Attorney and Judge Willson.
July 3	Order of Miller, J. entered extending time to file record and docket appeal for 90 days from filing of notice of appeal. (copies mailed U. S. Court of Appeals and appellees' counsel)
Sept. 22	Original record on appeal mailed U. S. Court of Appeals.

 IN UNITED STATES DISTRICT COURT

Complaint—Filed July 12, 1957

Now, comes the United States of America by D. Malcolm Anderson, United States Attorney in and for the Western District of Pennsylvania, and complaining of the defendants alleges:

I.

That this section is authorized and sanctioned by the Commissioner of Internal Revenue, the delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States.

II.

That at all times mentioned herein, this plaintiff has been and now is a sovereign corporation and body politic.

III.

That the defendant, William J. Brosnan, is presently residing at 608 North Homewood Avenue, Pittsburgh, Pennsylvania.

IV.

That the defendant, Francis H. Jacob, resides within the jurisdiction of this Court and is presently doing business at 718 North Homewood Avenue, Pittsburgh, Pennsylvania.

V.

That Mrs. Martha M. Berg, widow of J. D. Berg, is presently residing at 820 Beaver Road, Sewickley, Pennsylvania.

VI.

That the defendants, George H. A. Parkman and Gladys Marie Short Parkman, are husband and wife and are presently residing at Sharon Grade Road, Coraopolis, Pennsylvania.

5

VII.

That the defendant, Mountaineer Engineering Company, is a domestic corporation doing business within the jurisdiction of this Court.

VIII.

That the Commissioner of Internal Revenue assessed various withholding, FUTA, and FIAC tax deficiencies against Mountain Engineering Company for the tax periods indicated by the attached schedule marked Exhibit B and on the dates and in the amounts described in the aforesaid schedule; that notice of each of the described assessments was served upon the Mountaineer Engineering Company on or about the date alleged in said schedule; that the Mountaineer Engineering company has refused

to pay each of the alleged assessments and the outstanding principal balances due on each of the assessments is indicated by the said schedule, plus interest and penalties according to law; that the assessment list in respect to each assessment was received by the Collector or District Director on the date indicated by the said schedule; and that notice of lien for each assessment was filed with the Prothonotary of the Court of Common Pleas of Allegheny County on the date indicated in the said schedule.

IX.

That the District Director of the Internal Revenue for Pittsburgh, Pennsylvania on July 6, 1955 assessed an income tax deficiency for the calendar years 1948, 1949 and 1950 against George H. A. Parkman and Gladys Marie Short Parkman in the amount of $9,767.68; that notice of this assessment was mailed to each of these alleged taxpayers on July 7, 1955, and that demand for payment of this assessment was made upon each of these taxpayers on July 7, 1955; that both George H. A. Parkman and Gladys Marie Short Parkman have refused to pay this assessment and the outstanding principal sum on this assessment is $9,767.68, plus interest and penalties according to law; that the assessment list in respect to this assessment was made by the District Director on July 6, 1955, and that notice of lien for this assessment was filed with the Prothonotary of the Court of Common Pleas, Allegheny County, Pennsylvania on October 13, 1955.

X.

That on January 28, 1948, the defendant Martha H. Berg and J. D. Berg, her husband now deceased, conveyed to George H. A. Parkman and Gladys Marie Short Parkman a certain tract of land situated in Moon Township, Allegheny County, Pennsylvania, consisting of 175 acres, more or less, a description whereof is attached hereto, made a part hereof and marked Exhibit A; that as part of the consideration for this conveyance the defendants George H. A. Parkman and Gladys Marie Short Parkman executed and delivered a mortgage and accompanying bond to

Martha M. Berg, and J. D. Berg, which mortgage was dated January 28, 1948, was recorded in the Office of the Recorder of Deeds of Allegheny County in Mortgage Book Vol. 2924, Page 48, and which mortgage encumbered the premises described in Exhibit A attached hereto.

XI.

That since January 28, 1948, the defendants George H. A. Parkman and Gladys Marie Short Parkman have caused the real property described in Exhibit A attached hereto to be conveyed to the defendant Mountain Engineering Company, and to be re-conveyed to said George H. A. Parkman and Gladys Marie Short Parkman on at least two occasions; and that by virtue of said conveyances federal-tax liens securing the assessments alleged in Paragraphs VIII and IX encumbered the real property described in Exhibit A attached hereto.

XII.

That the defendants George H. A. Parkman and Gladys Marie Short Parkman fell in arrears in their payments on the bond given to defendant Martha M. Berg, and said defendant Martha M. Berg caused judgment to be confessed against defendants George H. A. Parkman and Gladys Marie Short Parkman before the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, on June 7, 1955, in the sum of $43,134.00; that on June 7, 1955, defendant Martha M. Berg, by praecipe, caused the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, to issue a writ of *fieri facias* directing the sale of the real property described in Exhibit A attached hereto by the Sheriff of Allegheny County.

XIII.

That after advertising the sale of the involved property by the Sheriff but before the actual sale by the Sheriff, the defendant Martha M. Berg attempted to subject the United States to the jurisdiction of the Court of Common Pleas of Allegheny County pursuant to Section 2410, 28 U.S.C. for the purpose of removing the aforementioned

federal tax liens as encumbrances from the involved real property described in Exhibit A attached hereto.

XIV.

That on December 30, 1955, Martha M. Berg assigned the judgment *pro confesso* against the defendants George H. A. Parkman and Gladys Marie Short Parkman, together with the securing mortgage to the defendants William J. Brosnan and Francis H. Jacob.

XV.

That on January 3, 1956, the Sheriff sold the real property described in Exhibit A attached hereto pursuant to the writ of *fieri facias* issued by the Prothonotary of the Court of Common Pleas of Allegheny County on June 7, 1955; and that the defendants William J. Brosnan and Francis H. Jacob bid the real property in at the Sheriff's sale for the sum of $6,203.23.

XVI.

That the sale price of $6,203.23 realized at the Sheriff's sale is but a small fraction of the actual or forced sale value of the involved real property.

XVII.

That if jurisdiction over the United States was obtained by the Court of Common Pleas of Allegheny County, Pennsylvania pursuant to Section 2410, 28 U.S.C., for the purpose of removing the federal tax liens hereinbefore alleged from the involved property described in Exhibit A attached hereto, then the United States acquired the right to redeem the involved property from the Sheriff's sale during the period of one year from the date of the sale; that the United States attempted to effectuate any right of redemption it may have in the involved premises by tendering on January 3, 1957, to said defendants William J. Brosnan and Francis H. Jacob the sum of $6,575.42, which sum represented the execution sale price plus interest from the date of the sale.

XVIII.

That the defendants William H. Brosnan and Francis H. Jacob refused the tender made by the United States on January 3, 1957.

XIX.

That the defendants William H. Brosnan and Francis H. Jacob refused to recognize the right of the United States to redeem the involved real property from the Sheriff's sale except upon such conditions that negated any right to redeem from the Sheriff's sale.

XX.

That the defendants George H. A. Parkman, Gladys Marie Short Parkman, Mountaineer Engineering Company, William J. Brosnan, Francis H. Jacob, and Martha M. Berg may have or claim to have some interest in the real property described in Exhibit A attached hereto.

WHEREFORE, plaintiff prays that it be awarded the following relief:

1. That the defendants named herein be required to answer this complaint alleging any interest they may claim to the real property involved herein.

2. That this Court determine and adjudicate that the Court of Common Pleas of Allegheny County acquired no jurisdiction over the United States for the purpose of foreclosing the alleged federal tax liens as encumbrances on the involved real property.

3. That this Court determine and adjudicate that the alleged federal tax liens are encumbrances on the involved real property.

4. That this Court determine and adjudicate the relative priorities of the federal tax liens and the claims asserted by the defendants named herein.

5. That this Court order the involved real property sold by the Marshal of this Court and that the proceeds of such sale be distributed in accordance with this Court's adjudication of the relative priorities of the claims asserted against the involved real property in this action.

6. In the alternative, if this Court determines and adjudicates that the Court of Common Pleas of Allegheny County did acquire jurisdiction over the United States and that the alleged federal tax liens were foreclosed as encumbrances on the involved real property, that this Court determine and adjudge that the United States exercised its right of redemption within the statutory period, and that this Court order the present titleholder to convey the premises in question to the United States upon receipt of the purchase price, plus interest, or upon receipt of whatever sum this Court deems proper, and further, that this Court grant all other such orders as are appropriate to effectuate the plaintiff's right of redemption.

/s/ D. Malcolm Anderson
D. MALCOLM ANDERSON
United States Attorney

/s/ Thomas J. Shannon
THOMAS J. SHANNON
Assistant

July 1957

Exhibit B to Complaint

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SCHEDULE

TYPE OF TAX	PERIOD OF TAX	AMOUNT ASSESSED	DATE ASSMT. LIST RECEIVED	NOTICE AND DEMAND	LIEN RECORDED	DATE LIEN NUMBER	ASSESSED BALANCE	ACCOUNT NUMBER
FIC	4Q 1948	$2,395.24	3/14/49	3/16/49	4/11/49	13,682	$2,395.24	Feb.49—5318
FUT	1948	1,402.29	3/14/49	3/16/49	4/14/49	13,686	1,402.29	Feb.49—220115
WT	4Q 1948	13,508.95	3/18/49	3/22/49	4/25/49	13,753	13,508.95	Mar.49—20359
WT	1st Q 49	5,644.92	7/21/49	7/25/49	8/29/49	14,659	5,644.92	Jul.49—20191
WT	2nd Q 49	8,745.89	8/24/49	8/29/49	9/26/49	14,897	8,745.89	Aug.49—20294
FUT	1948	2,580.63	9/30/49	10/3/49	10/4/49	14,939	2,580.63	Sep.49 Com.Sp.4 2-1
FUT	1949	6,125.42	10/17/51	10/23/51	11/28/51	17,330	6,125.42	Oct.51 Com.#2 96

12 IN UNITED STATES DISTRICT COURT

Answer of William J. Brosnan, Defendant—Filed August 5, 1957

Now comes William J. Brosnan, one of the defendants in the above entitled case, by his attorneys, William L. Jacob and William J. Jacob, Jr., and makes the following Answer to the Complaint filed by the plaintiff in the above entitled case:

I.

The allegation contained in Paraegraph I is neither admitted nor denied and if the same be material, defendant will demand strict proof thereof at the trial of this case.

II.

The allegation contained in Paragraph II is admitted.

III.

The allegation contained in Paragraph III is denied. This defendant never resided at 608 North Homewood Avenue, Pittsburgh, Pa. His residence is and has been at all times hereinafter mentioned 143 South Dallas Avenue, Pittsburgh, Pa.

IV.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph IV.

V.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph V.

VI.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VI.

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VII.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VII.

VIII.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VIII.

IX.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph IX. He admits the filing of said tax assessment in the Prothonotary's Office of Allegheny County, Pennsylvania.

X.

The allegations contained in Paragraph X are admitted. The said mortgage and its accompanying bond are dated January 28, 1948 and the judgment for $43,134.00 plus interest from June 1, 1955, entered on said bond at DSB 3089 July Term, 1955, relates back to January 28, 1948 and antedates all claims and tax liens held by plaintiff against said Parkmans, and the Mountain Engineering Company.

XI.

The allegations contained in Paragraph XI are admitted.

XII.

The allegation contained in Paragraph XII is admitted. Plaintiff failed to state that the said sale was by proper order of court, postponed until Tuesday, January 3, 1956.

XIII.

In answer to the allegation contained in Paragraph XIII, defendant avers that the plaintiff was brought
14 under the jurisdiction of the Common Pleas Court of Allegheny County, Pa., pursuant to Section 2410, 28 U.S.C. for the purpose of removing the aforementioned federal tax liens as encumbrances from the subject property. A petition to join the United States of America as additional party was prepared by J. Wray Connally, Esq. as counsel for Martha M. Berg and the same was presented in the Common Pleas Court of Allegheny County, Pa. at Fi. Fa. 521 July Term, 1955, sur DSB 3089 July Term, 1955, and on September 22, 1955, a rule was granted on the United States of America, George H. A. Parkman and Gladys Marie Short Parkman, to show cause why the United States of America should not be made a party to these proceedings, which rule was returnable within sixty days. The petition and rule were duly served

on the plaintiff and on the said Parkmans. No answer was filed within the sixty day period either by the United States of America or by the said George H. A. Parkman and Gladys Marie Short Parkman and consequently, on December 20, 1955, by order of the Common Pleas Court at the aforementioned number and term, the United States was joined as an additional party defendant to the end that the taxes due the United States of America enumerated hereinabove shall be divested by the sale of the real estate described in said petition, Exhibit "A". The said petition and rule and order of court are of record in the Prothonotary's Office of the Common Pleas Court of Allegheny County, Pa. at Fi. Fa. 521 July Term, [illegible]5, and by reference thereto are made a part hereof.

XIV.

It is admitted that on December 30, 1955, Martha M. Berg sold and assigned the judgment at DSB 3089 July Term, 1955 against the said George H. A. Parkman and Gladys Marie Short Parkman and also sold and assigned the mortgage and bond aforementioned to the defendants, William J. Brosnan and Francis H. Jacob, as tenants in common.

15 XV.

On January 3, 1956, the Sheriff of Allegheny County sold the real property described in Exhibit "A" to the use-plaintiffs in the said writ, namely, William J. Brosnan and Francis H. Jacob as tenants in common, on their nominal bid of "consts and taxes" and for which they were required to pay and did pay to the Sheriff the sum of $6,608.38. Their aforementioned judgment of $43,134.00 plus interest from June 1, 1955, was extinguished.

XVI.

Defendant denies that the sale price of said property to him and Francis H. Jacob was $6,203.23. On the contrary, he avers that he and the said Francis H. Jacob, as tenants in common, paid to the sheriff of Allegheny County, Pa. the sum of $6608.38 on their bid of "costs and taxes" and the judgment which they held against this property in the sum of $43,134.00 plus interest from June 1, 1955 was extinguished. They subsequently paid the

1956 land taxes against this property in the sum of $1340.29 and the 1957 land taxes in the sum of $1488.74, and also paid title examination fees and incurred attorney's fees.

XVII.

Defendant concedes that the United States has the right to redeem the involved property during the period of one year from the date of the Sheriff's Sale, to wit, January 3, 1956; but avers that such redemption must be in an amount that will reimburse the defendant and his co-tenant for their investment, to wit, the amount of the judgment entered on bond accompanying mortgage, interest, taxes and Sheriff's costs and other items due the owners as senior lienors, which amount in this particular instance, at the time of the alleged tender to him on January 3, 1957, was $55,591.28 itemized as follows:

16

To debt at DSB 3089 July Term, 1955	$43,134.00
To interest thereon June 1, 1955 to January 3, 1957	4,112.11
To costs and taxes paid at Sheriff's Sale	6,608.38
To interest thereon January 3, 1956 to January 3, 1957	396.50
To 1956 land taxes	1,340.29

to which sum should also be added the costs of title fees and attorney fees incurred by this defendant and by the said Francis H. Jacob. No such tender was made to this defendant. He denies that the plaintiff made any proper tender to him on January 3, 1957. No tender at all was made to Francis H. Jacob. On that date, an attorney representing the plaintiff, merely exhibited to this defendant a check for $6,575.42 which the said attorney stated was the amount of the sale price plus interest. No tender of cash was made to this defendant. The amount of said check was grossly inadequate as mentioned above.

XVIII.

As mentioned above, on January 3, 1957, a check for $6,757.42 was shown to this defendant, but he refused to

accept it because it was insufficient in amount. No tender of any kind was made to said Francis H. Jacob.

XIX.

The allegations contained in Paragraph XIX are denied. This defendant has been informed, believes and therefore avers that the United States did have the right to redeem the subject property within one year from the date of the Sheriff's Sale held on January 3, 1956, but he has also been advised, believes and therefore avers that such redemption is equivalent to a re-purchase and that the plaintiff did not make a proper and good tender, nor did it offer to pay a sum of money that was proper,
17 sufficient and adequate under the circumstances to constitute a tender, as more fully and at large set forth in Paragraph XVII hereof.

XX.

In answer to Paragraph XX, defendant avers that he and Francis H. Jacob, as tenants in common, are the sole and exclusive owners of the subject real estate and that the other parties named as defendants have no right, title, interest or claim in the same and neither does the plaintiff. The plaintiff has no right to redeem as it failed and neglected to comply with the law pertaining to redemption. No proper and legal tender was made to this defendant within the period of one year from the date of the Sheriff's Sale hereinabove mentioned, to wit, January 3, 1956, and no tender of any kind was made to said Francis H. Jacob.

WHEREFORE, defendant, William J. Brosnan, avers that the plaintiff is not entitled to the relief sought and respectfully asks that the Complaint in the above entitled case be dismissed, with costs allowed to this defendant.

NEW MATTER

(a) Plaintiff was brought under the jurisdiction of the Common Pleas Court of Allegheny County, Pa. by virtue of proceedings enumerated by defendant in Paragraph XIII of this Answer. Martha M. Berg, widow, by assignment piece of record in the Prothonotary's Office of Allegheny County, Pa. at DSB 3089 July Term, 1955, sold and assigned all her right, title and interest in and to the said judgment for $43,134.00 plus interest from June 1, 1955

to Francis H. Jacob and William J. Brosnan, which assignment by reference is made a part hereof.

(b) The amount paid by the said Francis H. Jacob and William J. Brosnan to the Sheriff of Allegheny County, Pa. on their bid of "cost and taxes" at the sale held on January 3, 1956, was $6,608.38. The judgment which they held against the said Parkmans by virtue of assignment from Martha M. Berg aforementioned, for $43,134.00 plus interest from June 1, 1955, was extinguished. Up to January 3, 1957, no proceedings were instituted by the said William J. Brosnan and Francis H. Jacob or either of them, to establish or claim any deficiency and no such proceedings could thereafter be instituted.

(c) The subject proceedings were instituted by the plaintiff at the behest of the Parkmans and their counsel to enable the said Parkmans to make a collateral attack on a regular and bona fide Sheriffs' sale, which collateral attack is contrary to the laws of the Commonwealth of Pennsylvania. Defendant also avers that these proceedings were also instituted for the benefit of the said Parkmans to enable them to effect a re-sale of this subject property to their own profit and advantage after they had neglected and refused to bid for the same at the Sheriff's sale held on January 3, 1956, all at the expense, loss and detriment of this defendant and Francis H. Jacob.

(d) Defendant is informed, believes and therefore avers that the funds or money represented by the check shown this defendant on January 3, 1957, was not funds owned by the plaintiff but by the Parkmans or their friends as prospective purchasers of the subject property.

(e) The said Parkmans filed no exceptions to the Sheriff's sale aforementioned, but thereafter retained possession of the building on this subject property and failed and refused to pay rent for the same. At No. 1618 January Term, 1957, this defendant and Francis H. Jacob were required to institute proceedings in Common Pleas Court to acquire possession. In that case, the Parkmans filed an answer and called upon the United States of America to assist them in a defense, calculated to delay matters and deprive the owners of their lawful rights, which pro-

ceedings are hereby referred to and made a part
19 hereof. The said Parkmans also instituted proceedings against this defendant and Francis H. Jacob at No. 109 July Term, 1957, in the Common Pleas Court of Allegheny County, Pa. in equity, which proceedings are frivolous, without merit and calculated to cause delay and prevent this defendant and Francis H. Jacob from enjoying the use and benefit of the property which they, in good faith, bought and paid for. Said suit is by reference made a part hereof.

Respectfully submitted,

/s/ William L. Jacob
/s/ William L. Jacob, Jr.

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20 IN UNITED STATES DISTRICT COURT

Government's Exhibit 1

Copy of D. S. B. Docket Entries.

Commonwealth of Pennsylvania,
Allegheny County, ss.:

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the D.S.B. Docket Entries at No. 3089 July Term, 1955, to-wit:

D.S.B. Docket Entry.

Martha M. Berg,

#3089 vs. Narr.

George H. A. Parkman, Jr., and Gladys Marie Short Parkman, His Wife

Penalty $90,000.00. R.H. $43,134.00.

And now, June 7, 1955, comes William C. Hurtt, and upon warrant of Atty. filed in Bond Dated January 28, 1948, appears for Dfts. and confesses judgment against Dfts. for Ninety Thousand and 00/100 Dollars to be re-

leased upon payment of Forty Three Thousand One Hundred Thirty Four and 00/100 Dollars (Including Interest to June 1, 1955 and Atty's Com.) with costs of suit. Waiving Inq., Cond. and Exemp. Payable as per conditions of Bond Filed. Bond accompanies a mortgage recorded in Mortgage Book Vol. 2924, Page 48. The precise residence of the Plff. is: Township of East Harwich,
21 Chatham P.O. Massachusetts, and the last known of the Dfts. is: Sharon Grade Rd., Moon Twp.
Time: 9:56 AM.

DAVID B. ROBERTS, Prothonotary (JL)

Dec. 31, 1955 per writing filed and for value received this judgment. debt interest and costs are hereby assigned to WILLIAM J. BROSNAN and FRANCIS H. JACOB, their heirs and assigns.

DAVID B. ROBERTS, Pro.

Fi. Fa. 521 July 1955

Commonwealth of Pennsylvania,
ALLEGHENY COUNTY, ss.:

I, DAVID B. ROBERTS, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the D. S. B. Docket Entries wherein MARTHA M. BERG Plaintiff and GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, His WIFE, Defendants; as the same remains of record before the said Court, at No. 3089 of July Term, A. D. 1955 D.S.B.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, the 19th day of March A.D. 1957.

s/ DAVID B. ROBERTS
Prothonotary,
By s/ LOUIS W. SAUERS
Deputy

[SEAL]

Government's Exhibit 2

Copy of EXECUTION Docket Entries.

Commonwealth of Pennsylvania,
ALLEGHENY COUNTY, ss.:

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the EXECUTION Docket Entries at No. Fi.Fa.521 July Term, 1955, to-wit:

EXECUTION Docket Entry.

MARTHA M. BERG

521 vs.

GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, HIS WIFE

Fi. Fa. Sur. No. 3089 Jul. Term, 1955.

DOCKET D.S.B.

Penalty, $90,000.00		
Real Debt	43,134.00	
Int. from, June 1, 1955		
Atty's	10.00	J.W.C.
Pro. F.,	1.00	12 31 55.
Sheriff		
" M.,		

WAIVING INQ. COND & EXEMPTION

June 27, 1955, upon motion of John M. Feeney, Jr., Petitioner, it is hereby ordered that the Sheriff Sale at
23 the above number & term of the real estate of George H. A. Parkman and Gladys Marie Short Parkman, his wife, be postponed from July 5, 1955, to Sept. 12, 1955, that no alias writ of Fi. Fa. be required, and that said sale be held without additional advertising, it is further ordered that a certified copy of this order shall be delivered promptly to the Sheriff of Allegheny County, Pa. September 12, 1955, it is ordered that Sheriff Sale be postponed to the first Monday of December, 1955; that no alias writ of

Fi. Fa. be required and that said sale be held without ADDITIONAL ADVERTISING, FURTHER, A CERTIFIED copy of this Order be delivere dpromptly to the Sheriff of Allegheny County. September 22, 1955, petition presented in open Court, and a Rule is granted on the United States of America, GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, to show cause why the UNITED STATES OF AMERICA should not be made a party to this proceeding. October 6, 1955, Affidavits of service of petition by Registered Mail on Defendants and on Atty. General of the United States of America filed. P.O. receipt attached, 9-28-55, at 10:40 A.M. served United States of America as additional party at their place of business, Federal Building, Grant Street, Pittsburgh, Pa., by handing to John A. DeMay, Jr., Assistant U.S. Attorney in charge thereof for the time being a true and correct copy of the within petition and rule making known to him the contents thereof.

SO ANSWERS WILLIAM H. DAVIS, SHERIFF

Dec. 5, 1955, on motions sale postponed to First Monday of January, 1956. Dec. 20, 1955, on motion rule absolute and United States of America is hereby joined as a party Defendant to the end that taxes due the United States of America enumerated in said petition and the tax lien in favor of United States of America subsequently filed Oct. 13, 1955 in Prothonotary Office of Allegheny County
24 at No. 13623 being additional income tax for the year 1948-1949-1950 in the amount of $9,767.68 against said George Parkman, Jr. & Marie Parkman shall be divested by sale of real estate described in said petition being made by the Sheriff of Allegheny County on Jan. 3, 1956 after which sale the said real estate so sold shall be free & clear of all liens. Jan. 14, 1956, Leonard H. McMillen Real Estate deputy Sheriff of Allegheny County, appeared before David B. Roberts, Prothonotary and acknowledged deed to William J. Brosnan and Francis H. Jacob, Eodie, notice of acknowledgment posted. Jan. 23, 1956, no exception being filed to Sheriff sale same is confirmed absolutely and deed re-delivered to Sheriff. Jan. 25, 1956, certificate of Recorder of Deed filed, showing Sheriffs Deed Recorded in D.B. Vol. 3510, Page 64. Jan. 27, 1956, I do certify that by virtue of this writ to me directed, after due public and

timely notice by me given, according to law, of the time and place of sale, I did on Tuesday, Jan. 3, 1956 at 10:00 o'clock A.M. at the Court House, City of Pittsburgh, expose the premises within described to sale by public vendue or outcry, and then and there sold the same to William J. Brosnan and Francis H. Jacob for the sum of $6203.23 they being the highest and best bidder, and that the highest and best price bidden for the same which sum I have applied as follows, to-wit:

To cost in full on this writ	446.33
To John McGrady, Co. Treas. 1952-53-54-55 Tax	1636.74
To Robert VanderVoort, Sol. 1952-53-54-55 Twp. & School Tax	4120.16
	6203.23

So Answers

25 So Answers

William H. Davis, Sheriff

Sheriff Pd.	5.00
M. "	1.00

Commonwealth of Pennsylvania,
Allegheny County, ss.:

I, David B. Roberts, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the Execution Docket Entries wherein Martha M. Berg Plaintiff and George H. A. Parkman, Jr. and Gladys Marie Short Parkman His Wife Defendants; as the same remains of record before the said Court, at No. Fi. Fa. 521 of July Term, A. D. 1955.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of the said Court, the 19th day of March A.D. 1957.

s/ David B. Roberts
Prothonotary.

By s/ Louis W. Sauers
Deputy

[Seal]

26 IN UNITED STATES DISTRICT COURT

Opinion and Order—April 29, 1958

Opinion

WILLSON, District Judge

In this civil action the United States seeks to enforce liens for unpaid taxes. The controversy arises because admittedly the tax liens were junior in point of time to a duly recorded purchase money mortgage on the real property in question. The mortgage has been foreclosed. The defendants, who were the purchasers at the mortgage foreclosure sale, claim that the mortgage foreclosure proceedings divested the unpaid tax liens of the Government. The Government contends that the unpaid tax liens were not divested by the foreclosure sale. The Government is proceeding under the authority of 26 U.S.C.A. 7403, entitled "Action to enforce lien or to subject property to payment of tax." In the alternative, under 28 U.S.C.A. 2410, the Government seek the right to redeem the real property from the foreclosure sale which has been held under and pursuant to the laws of the State of Pennsylvania.

Defendants are William J. Brosnan and Francis H. Jacob, the purchasers of the property at the mortgage foreclosure sale, who had, prior to the sale, purchased the mortgage from Martha M. Berg, one of the original mortgagees, who was named defendant but has been dismissed. Other defendants are George H. A. Parkman and Gladys Marie Short Parkman, who were owners of the property during times when some of the tax liens were assessed and filed, and Mountain Engineering Company, a corporation, who also owned the property at various times during which tax liens were assessed and filed in the Office of the Prothonotary of Allegheny County.

The case was tried non-jury upon evidence which was largely stipulated; however, some testimony was taken.

27 There is no material conflict in the evidence as to what has occurred. Findings of fact and conclusions of law will be found in this opinion as permitted by Rule 52 of the Federal Rules of Civil Procedure.

The property in question consists of 175 acres more or less and is valuable. It was formerly owned by Martha M. Berg and her husband, J. D. Berg. On January 28, 1948, the Bergs conveyed the property to George H. A. Parkman, Jr. and his wife Gladys Marie Short Parkman, taking back a purchase money mortgage dated January 28, 1948, and recorded in Mortgage Book Volume 2924, page 48, for $45,000 and a mortgage bond in the penal sum of $90,000. The realty was then conveyed and reconveyed by the Parkmans to Mountain Engineering Company, a corporation, which they controlled, and back again on at least two occasions. These conveyances were all subject to the purchase money mortgage. During a period when the corporation owned the property, certain Federal Unemployment Tax Act and Federal Insurance Contributions Act tax deficiencies of Mountain Engineering Company, which were assessed by the Commissioner of Internal Revenue, became liens on the involved real estate. These liens were filed of record in the office of the Prothonotary of Allegheny County between April 12, 1949 and November 28, 1951.

In addition, the Commissioner of Internal Revenue assessed an income tax deficiency of $9,767.68 against George H. A. Parkman and Gladys Marie Short Parkman on July 6, 1955, at a time when they owned the property, this assessment being filed in the office of the Prothonotary of Allegheny County, Pennsylvania, on October 13, 1955.

It thus appears and is conceded that all the Government tax liens were filed of record in the office of the Prothonotary subsequent to the recording of the mortgage.

Default having occurred in the payment of the mortgage debt, on June 7, 1955, Martha M. Berg, the surviv-
28 ing mortgagee, caused a confession of judgment on the mortgage bond to be entered in the office of the Prothonotary of Allegheny County at D.S.B. 3089 July Term 1955. The debt recited in the judgment is the sum of $43,135.00 principal, plus interest from June 1, 1955.

Martha Berg's attorney caused a praecipe to issue by the Prothonotary, directing the sheriff to sell the property on a writ of *fieri facias*. The sale was duly advertised as required by state law and was originally set for July 5, 1955, but by various orders of the Common Pleas Court, the sale was postponed from July 5, 1955 to January 3,

1956, at which time the sale was held by the sheriff, who sold the property to defendants Brosnan and Jacob, who in the meantime, in December, 1955, had purchased the mortgage and bond from Martha M. Berg. At the sale the defendant purchasers paid the sheriff the sum of $6,203.23.

At this point the action of Martha M. Berg in invoking 28 U.S.C.A. 2410 should be mentioned. On September 22, 1955, she filed a petition in the Court of Common Pleas of Allegheny County for a rule upon the United States and the Parkmans to show cause why they should not be made parties to the foreclosure proceedings. The rule was granted and served upon the United States and the Parkmans. No answer or response was filed by either the Parkmans or the United States within the sixty day period set forth in the rule. On December 20, 1955, the rule was made absolute by the state court. In the rule to show cause served upon the United States, the judgment creditor sought an adjudication of the state court that the Government tax liens would be divested by the sale on the writ of *fieri facias* issued on the judgment confessed on the mortgage bond. Such a judgment under Pennsylvania law makes the lien of a judgment confessed on a mortgage bond relate back to the entry of the recording of the mortgage. *Boyer* v. *Webber*, 22 Pa. Super. 35; *DeWitt's Appeal*, 76 Pa. 283.

29 As mentioned, the Government paid no attention to the state court proceedings until January 3, 1957, which the Government contends is one day less than one year from the date of the sale of the property and is the last day it could redeem the property according to its right of redemption secured to it under 28 U.S.C.A. 2410. On that day, January 3, 1957, Robert X. Blair, revenue officer, attempted to effect a redemption of the property by making a tender. He testified that he had a Government check in the amount of $6,575.42, which represented the amount bid at the sheriff's sale plus interest, and that he contacted the defendant William Brosnan, stated his purpose, offered Mr. Brosnan the check and it was refused, because Mr. Brosnan considered the amount to be wholly inadequate. He, however, referred the revenue officer to his lawyer, William L. Jacob, Esq. No attempt was made to tender redemption money to the other co-owner, Francis H. Jacob,

because the attorney, William L. Jacob, Esq., indicated that the sum offered would not be accepted.

It should be emphasized that the foregoing was the only effort made by the Government to redeem. During the one year interval both the purchasers at the sale resided in and had places of business in the greater metropolitan area of Pittsburgh and had telephones listed in their names at their homes and places of business.

On January 3, 1957, defendants Brosnan and Jacob contend that they had in the property $55,591.28, which was the amount of their mortgage debt reduced to judgment, plus interest, taxes and costs. They contend that that was the amount the Government should have tendered in redemption of the premises under Section 2410.

DISCUSSION OF LAW AND CONCLUSIONS

If the mortgagee has correctly and validly made the United States a party to the foreclosure action under 28 U.S.C.A. 2410, and the sale was a judicial one, the foreclosure of the mortgage discharged and extinguished the unpaid taxes as liens on the property and transferred such liens to the fund created by such sale, if any. However, it is my opinion that the defendants did not properly invoke Section 2410 to make the United States a party to the state action.

It must be emphasized that the judgment of confession on the mortgage bond had already been entered and the property had been advertised and the sale date fixed when a rule to show cause was issued calling upon the United States to answer as to why it should not be made a party. It seems clear that to properly invoke Section 2410, the United States must be named initially as a defendant in the state court civil action. The statute permits the United States to be named as a defendant, the Government thus waiving its immunity, in a proceeding brought to foreclose a mortgage or other lien ". . . upon real or personal property on which the United States has or claims a mortgage *or other lien*." But the statute requires that a complaint ". . . shall set forth with particularity the nature of the interest or lien of the United States." It contemplates that the United States shall have sixty days to answer to the merits. The most that can be said about the proceedings in the instant case is that an attempt was

made to make the United States a party to the execution of a judgment already entered, towit, on June 7, 1955. One method that Pennsylvania lawyers use under this section, which in the opinion of this court is effective and valid, is to commence a mortgage foreclosure by the issuance of a *scire facias sur* mortgage. If that proceeding is used, the United States can be made a party prior to the entry of the judgment of foreclosure on the mortgage. The judgment entered in that event would be a judgment on the merits binding upon the United States as to the amount due on the mortgage debt, and of the nature and character of the Government's lien. I do not think that the statute requires that the pleadings served upon the government must necessarily be designated a complaint, but a pleading in substantial compliance with the statute is required. It is therefore concluded that Section 2410 was not validly invoked by the mortgagee in the foreclosure of the instant mortgage.

31

The Government claims that it had the right under Section 2410, if it was made a party to the state action, to redeem the property within one year as provided in that section. This issue is quickly disposed of.

Just recently, that is on April 11, 1958, the Court of Appeals decided *United States* v. *Cless*, 3 Cir., —— F.2d ——. This decision determines that Section 2410 is not mandatory but only permissive in the foreclosure of a first mortgage on property which is encumbered by a second mortgage owned by the United States. Having held that Section 2410 was not validly invoked by the mortgagee in the instant case, it might be said to follow that the Government has no right of redemption, because such a right is only given under Section 2410. But assuming that the section was not invoked, then the query is, does the United States have the right to redeem? That question need not be answered here, because certainly the amount tendered was wholly inadequate in any event.

If the Government's position is accepted, the effect is that it can redeem by paying approximately one-eighth of the amount of the mortgage debt. The Supreme Court had this very issue before it in the case of *Collins* v. *Rigas*, 81 U.S. 491, and its opinion quoted below should be sufficient

answer that the amount necessary to be tendered in order to redeem property is the full amount of the mortgage debt.

> "It is clear that the criterion by which the amount tendered was gauged was incorrect. To redeem property which has been sold under a mortgage for
32 less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt."

See also *American Loan & Trust Co.* v. *Atlanta Electric Ry. Co.*, 99 F. 313; and 37 Am. Jur. 837. It is therefore the conclusion of this court that no redemption by the Government has been accomplished in this case.

The point is now reached in this case and is squarely presented as to whether the subordinate Federal tax lien was cut off by the foreclosure of the purchase money mortgage pursuant to the law of Pennsylvania. This foreclosure under state law was accomplished exactly as was done in *United States* v. *Cless*. It should be repeated as was stated in that decision, that it is not necessary to join the subordinate lienors in a foreclosure action, nor to give them actual notice. However, as I view this decision, the precise question now under consideration has not been decided. An authoritative decision is desirable.

Federal tax liens and their relation to the foreclosure of mortgages have recently been the subject of several articles in legal publications. Divergent views are expressed and there is no unanimity of opinion and agreement as to whether Federal tax liens are divested by the foreclosure of prior mortgages. This court finds it is on the horns of a dilemma because of two authoritative decisions. The line of cases which accepts *Metropolitan Life Ins. Co.* v. *United States*, 6 Cir., 107 F.2d 311, as authoritative held that the Government tax lien is not divested by the foreclosure of a

prior first mortgage. The other line of authority is
33 more recent and is typified by *United States* v. *Boyd*, 5 Cir., 246 F.2d 477, decided on June 28, 1957. The Boyd case holds that the foreclosure of mortgage under a power of sale extinguishes all liens subordinate of record to the mortgage and specifically in that case, an unpaid Federal tax lien.

In my opinion, the Metropolitan and Boyd decisions are irreconcilable. In making this decision, I must choose one or the other as the precedent: It seems to me that the Boyd case, in view of the Court of Appeals decision in the Cless case, presents the logical and reasonable answer to the problem in the instant case. Section 2410 not being mandatory, 26 U.S.C.A. 6323(a) of the 1954 Internal Revenue Code should be given its full effect. It says:

> "(a) Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by Section 6321 shall not be valid as against any mortgage, . . . until notice thereof has been filed . . ."

Section 6321 of the Code gives the United States a lien against the property or rights to property of a person who neglects to pay a tax. Section 6323, however, protects the prior mortgagee. It seems to me that the Metropolitan decision detracts from and dilutes the effect of the recognition given to a mortgage by Section 6323. The logical and reasonable view of the situation appears to be that as set forth in the Boyd case, where the court said:

> "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a
> 34 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cut off all junior liens including those of the Govern-

ment. *Trust Company of Texas* v. *U.S.*, D.C.Tex., 3 F.Supp. 683; *U.S.* v. *Ryan*, D.C.Minn., 124 F.Supp. 1, 10, cf. *Minnesota Mutual Life Ins. Co.* v. *U.S.*, D. C. Tex., 47 F.2d 942; *Oden* v. *U.S.*, D.C.La., 33 F.2d 553."

In various articles and decisions on this subject, some of the writers make a distinction or attempt to, as to the property right remaining in a mortgagor after the execution of the mortgage. In Pennsylvania this matter has been settled. See *Brunn* v. *Wichser*, 3 Cir., 75 F.2d 25, where Judge Woolley cites several Pennsylvania decisions, all to the effect that in Pennsylvania the general rule is that a mortgage is a lien only and not an estate; between the mortgagor and the mortgagee, title is in the mortgagee, but as to all other persons, the mortgagor is regarded as the owner and title is in him. The Government lien in the instant case thus fastened upon a title to real property.

In a recent decision of the Court of Appeals, Judge Biggs writing the opinion, *United States* v. *Beaver*, 252 F.2d 486, reiterated the principle that priority to be awarded to United States tax liens is purely a Federal question. He also said, page 489:

"... Since the case of Rankin v. Scott, 1827, 12 Wheat. 177, 6 L.Ed. 592, 25 U.S. 177, 179, wherein Mr. Chief Justice Marshall enunciated the principle 'that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds,' the federal rule has been that 'the first in time is the first in right,' U. S. v City of New Britain, 1954, 347 U.S. 81, 85-86, 74 S.Ct. 367, 98 L.Ed. 520 and this is true whether or not the property be after acquired. Glass City Bank of Jeanette, Pa., v. United States, 1945, 326 U.S. 265, 66 S.Ct. 108, 90 L. Ed. 56."

35 It is noticed that the Government sought certiorari to the Supreme Court in the *Boyd* case which was denied on December 11, 1957, No. 503 October Term, Supreme Court, 1957. In searching for authority for the Government's position, I secured and have examined the brief of the Solicitor General of the United States presented in his application for the writ of certiorari. The Solicitor General, it seems to this court, wrote a compre-

hensive and exhaustive brief on the subject under discussion. One of the cases he relied on is *U.S.* v. *Kensington Shipyard & Drydock Corp.*, 3 Cir., 169 F.2d 9, but in that case it is to be noticed that the Government tax lien was the first prior lien on the property and the case is therefore distinguishable on the facts from the *Boyd* case. This court is aware of the rule that a denial of certiorari by the Supreme Court is not an adjudication of the issue presented to that court. But it does seem strange that if the *Boyd* case is not the law, considering the importance of the question and its relation to the collection of Federal taxes, that four of the Supreme Court justices should refuse certiorari. It seems to me, that to give full force and effect to that protection requires a further ruling that on foreclosure of such a mortgage the subordinate tax lien is divested. This carries to its logical conclusion the principles quoted by Judge Biggs in *United States* v. *Beaver*, ". . . that a prior lien gives a prior claim. . . ." and that ". . . the first in time is the first in right."

Judgment will be directed for the defendants.

Order—April 29. 1958

And Now, this 29th day of April, 1958, for the reasons mentioned in the foregoing opinion, the Clerk is directed to enter judgment in favor of the defendants William J. Brosnan, Francis H. Jacob, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering
36 Company, and against plaintiff, the United States of America, and the complaint and civil action are dismissed.

/s/ Joseph P. Willson
United States District Judge

IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed June 30. 1958

Notice is hereby given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action signed by the Honorable Joseph P. Willson on

April 29, 1958 and entered on the judgment docket on May 1, 1958.

UNITED STATES OF AMERICA

HUBERT I. TEITELBAUM
United States Attorney

By: /s/ THOMAS J. SHANNON
Assistant United States Attorney

June 30, 1958

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37 **Appendix to Brief for William J. Brosnan and Francis H. Jacob, Appellees—Filed December 12 1958**

[File endorsement omitted]

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39 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15973

UNITED STATES OF AMERICA

VS.

WILLIAM J. BROSNAN and FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN and MOUNTAIN ENGINEERING COMPANY

I.

Transcript of Proceedings on Non-Jury Trial—January 22, 1958

Before: HON. JOSEPH P. WILLSON, D. J.
Place: Pittsburgh, Pennsylvania.

Counsel Present:

Robert Coe, Esq., John R. Gavin, Esq., for Government.
William L. Jacob, Esq., Edward P. Good, Esq., for Defendants.

40 MR. GAVIN: May it please the Court, I would like to present at this time Robert Coe of the Tax Division of the Department of Justice, who is here to present

the Government's case. He is a member of the Bar of the State of Virginia.

THE COURT: Glad to have you, Mr. Coe.

MR. COE: Thank you.

THE COURT: Gentlemen, who do we have here for the defendants?

MR. JACOB: Your Honor, I represent William J. Brosnan and Francis H. Jacob.

THE COURT: That is why I made the inquiry, Mr. Jacob.

Colloquy Between Court and Counsel

MR. JACOB: Martha M. Berg is not in this case anymore. Petition was filed in this Court by J. Wray Connolly and this Court made an order dismissing the case as to her. That was presented, I believe, in December of 1957. The order stated that Mrs. Berg has no interest and will claim no interest in the real estate which is the subject matter of this action, and it ordered and decreed that Martha M. Berg be dismissed as a party defendant in this case.

THE COURT: All right, that takes care of her.

MR. GOOD: If the Court please, I represent George and Marie Parkman. We filed an answer admitting all the averments. We have no contest with the Government in regard to this action. Our interest, in fact, coincides with the Government. They were the mortgagor.

THE COURT: What about the Mountain Engineering Company?

41 MR. GOOD: The same is true there. The Mountain Engineering Company was the predecessor of George and Marie.

THE COURT: The contest, then, is between Brosnan and Jacobs and the Government, is that it?

MR. JACOB: That's right.

THE COURT: All right, gentlemen, proceed.

MR. COE: If Your Honor please, the Government has come into this suit to seek alternative remedies. The first one is to effectuate and enforce a statutory right which

is granted the United States as a condition of the waiver of its sovereign immunity under Title 28, United States Code, Section 2410, by which the mortgagees in this action attempted to join the United States as a party on a mortgage foreclosure. In the alternative, the Government would seek a determination that the Court of Common Pleas of Allegheny County in the mortgage foreclosure action did not acquire jurisdiction over the United States, and therefore, the tax liens of the United States are still valid and persisting upon this property involved.

The pleadings which have been filed in this action will show the sequence of events which seems to be undisputed.

THE COURT: What are they? Let's hear those so that we have a record here that shows it without having to dig them out of the complaint and the answer and so on.

MR. COE: There was a bond secured by a mortgage given by the defendants, Mr. and Mrs. Parkman, to one
42 Martha Berg. When the Parkmans defaulted upon payment under the mortgage and bond, a confession of judgment was entered, and on this confession of judgment a right of fieri facias was issued to the sheriff to sell the property involved. After the writ was issued and prior to the sale, the judgment was assigned by Martha Berg to the defendants William Brosnan and Francis Jacob. At the same time or during the same period, a rule to show cause was issued out of the Court of Common Pleas of Allegheny County against the United States to show cause why it should not be made a party defendant in that action to set up asserted tax liens which had appeared of record against all rights belonging to the Parkmans.

During this period, the sale was postponed for a period of sixty days and longer. When the sale was conducted on January 3, 1956, the property involved was sold to William Brosnan and Francis Jacob for the sum of $6,203.23, which amount was applied to costs and taxes.

On the third of January, 1957, within the time allowed by the statute, the United States tendered this amount, the sale price, exercising the right of redemption abiding by the statute and demanding delivery of the deed of the property.

THE COURT: Tendered it to whom?

MR. COE: To William Brosnan in person and also to his attorney, Mr. Jacob, acting for both of them. There will be further evidence as to this tender.

43 This tender was refused on the grounds that it was insufficient. And then the United States commenced this action to enforce the right of redemption.

THE COURT: Let's see, do I understand, Mr. Coe, from what you said the mortgage lien was entered of record ahead of the tax lien in Allegheny County?

MR. COE: Yes, Your Honor, the mortgage lien was prior to our tax liens.

THE COURT: All of your tax liens?

MR. COE: Yes, all of them.

THE COURT: Then the Government, you claim, was not made a party in the foreclosure?

MR. COE: In the alternative, yes, Your Honor, we claim the provision by which this claim, the bond, was reduced to judgment was not a foreclosure procedure contemplated by the United States Code, Section 2410, that it was merely an action for a money judgment, and that an execution sale resulted and not a judicial sale, as the statute provides, and that these two——

THE COURT: They confessed judgment on the bond?

MR. COE: Yes, Your Honor.

THE COURT: Then sold the real estate?

MR. COE: On the writ of fieri facias.

THE COURT: When was the Government made a party to this proceeding, if ever?

MR. COE: Well, the rule to show cause was issued between the time the writ of fieri facias issued to the sheriff

44 and the sale. As I understand the sequence of events that occurred here, after the confession of judgment was entered and the writ of fieri facias issued, the existence of these Federal liens was either discovered or the parties involved decided that they would not be discharged unless the United States were brought into

this action. That was what prompted the delay in the sale and the issuance of the rule to show cause why the United States should not be joined as parties.

THE COURT: Did the Government answer that rule to show cause subject to its jurisdiction there?

MR. COE: The Government did not answer, Your Honor. The rule to show cause—the Government took the position at the time that the action itself was not within the contemplation of the statute and it would not be binding on the United States and they had no duty to appear and defend.

THE COURT: What is the procedure outlined in the Federal statute that the parties shall take in order to divest the Government's liens? This question has come up before.

MR. JACOB: At this stage, I think that Mr. Coe has made a statement here to the Court that he cannot sustain as to what the Government had in mind, because at that time Mr. J. Wray Connolly who represented Mrs. Berg came down here and inquired from Mr. Blair, who was representing the Government, as to what should be done to have these liens discharged, and Mr. Blair gave it to him in writing. And all that information was here right in this Court.

43 THE COURT: Who?

MR. JACOB: Mr. Blair was representing the United States Government. And Mr. Connolly followed the directions given to him by the United States Attorneys office.

THE COURT: The statute sets forth what has to be done.

MR. JACOB: Right, and that was what was done.

THE COURT: To divest the Government of the real estate.

MR. JACOB: And all of that was done. It is a matter of record and Judge Weiss made the final order on December 20, 1955—or '56. I have it all here and I am going to offer that in evidence in due course.

MR. COE: Your Honor, Mr. Jacob has the advantage over me there, in that I was——

MR. JACOB: I have been through this all along.

MR. COE: I have not been in these proceedings here. I presume Mr. Blair was an Assistant U. S. Attorney?

MR. JACOB: Yes.

MR. COE: Here?

MR. JACOB: I don't know.

MR. COE: If he outlined a procedure which he says the United States might be joined, it would not necessarily follow that that was binding upon the United States.

46 THE COURT: In other words, Mr. Blair doesn't have the authority to bind the United States as to what the law is.

MR. COE: But if Your Honor will indulge me a moment, I can quickly cover the points the statute requires.

THE COURT: Let's see that statute. What are you reading?

MR. COE: 28 U.S.C. Section 2410.

THE COURT: We have it. Go ahead, read it.

MR. COE: All right. It says under the conditions prescribed in this section and Section 1444, which pertains to removals of actions to the Federal court from the state courts for protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska or state court having jurisdiction of the subject matter entitled to or for the foreclosure of a mortgage or other lien on real or personal property. The complaint shall set forth with particularity the nature and interest of the lien of the United States. In actions in state courts service upon the United States shall be made by process of the court with a copy of the complaint upon the United States Attorney for the district in which the action is brought. Then also notice upon the Attorney General in Washington by registered mail.

The United States has sixty days to appear. And it goes further that a judicial sale in such action or suit

shall have the same effect with respect to the dis-
47 charge of liens or encumbrances by the United
States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States—that doesn't apply here.

Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

That is it in essence. I don't think we have any quarrel in the nature of these proceedings——

THE COURT: You take the position it doesn't make any difference if you are not first—in other words, put it this way, if the liens of the Government are not still on the property, you say then you made a tender in any event, is that it?

MR. COE: If the liens to the Government are not on the property?

THE COURT: Yes.

MR. COE: Yes, sir.

THE COURT: You made a tender in any event under the statute?

MR. COE: If this proceeding——

THE COURT: It was regular on its face?

MR. COE: It was regular on its face, the United States
was properly joined, our liens were divested under
48 the sale. But under the provision of the statute, we
have a year from that to redeem the property from the sale.

THE COURT: You made that tender?

MR. COE: And we made the tender within the proper time.

THE COURT: Is the tender made to the purchaser?

MR. COE: The tender was made to the purchaser.

THE COURT: Is that the correct way to make it?

MR. COE: The statute doesn't say. But in the laws and tradition of rights of redemption after sale, it is to the purchaser who then at the time owns the property. We would have no other place to make it in view of the fact that the title has passed to the purchaser.

THE COURT: All right. We will go ahead with your case.

MR. COE: The point that Mr. Jacob raised about being advised that this was the procedure to follow, it would still not answer the question as to whether the particular action which had been commenced in the Court of Common Pleas of Allegheny County was a foreclosure suit resulting in a judicial sale within the meaning of Section 2410 and which is the alternative.

THE COURT: What other sale would they have up there except that?

MR. JACOB: None.

49 THE COURT: The first paragraph of that section says to quiet title or the foreclosure of other liens. Any kind of lien ahead of the United States that divested a United States lien as I understand it, you make the United States a party and that transfers the lien from the property to the fund in court?

MR. COE: That is quite true. I think the distinction and the point of contention lies in whether this section referred to is an equity foreclosure resulting in a judicial sale as a common equity practice——

THE COURT: I don't know where you practice law, but I think the law of Pennsylvania for a great many years used that section in foreclosing mortgages either mortgage or judgment on confession of the bond to bring the United States in.

MR. COE: I don't know about the United States part. I know that is the common practice to collect on bonds that were secured by mortgages. But the question which we pose, is that a proper foreclosure procedure in which a party has had a chance to appear and defend, set up its liens and hasn't been adjudicated. If I understand the

procedure that was involved here, actually it was a money confession on judgment on which the confession issued.

THE COURT: On the mortgage bond.

MR. COE: On the bond, yes, Your Honor. And that is no different there as I can see on a suit on a contract. You still have a money judgment and you would have execution issued and the sheriff could go out and find any property on which to levy and have his sale.

50 THE COURT: Well, you know, of course, under the law of Pennsylvania that a judgment entered on a mortgage bond takes its lien in accordance with the terms of the mortgage which is given as security. That date of that lien relates back to the date of the bond. You might confess ten years after that bond is given, but your judgment, your lien is determined by the date of your mortgage lien as filed in the office.

MR. COE: That may be true, but I still don't think——

THE COURT: In other words, that is foreclosure of mortgage in Pennsylvania.

MR. COE: It is the procedure followed by Pennsylvania law.

THE COURT: Sure.

MR. COE: But this alternative position we have taken, that is not the type of——

THE COURT: You want the Court to decide something here that I don't believe you will get him to decide because I think that is a mortgage foreclosure under the law. That is my impression of it, Mr. Coe, very frankly. On the other hand, whether or not they subjected the Government to that proceeding in this case, that is different entirely, if they didn't give you sixty days to answer and all that sort of thing. They have to follow that statute in order to divest the Government liens, I will be frank to say that. I think that is a subject here to litigate, to decide.

MR. COE: Well, that as I said is the bone of contention to be decided as you said. Now, if we may perhaps
51 go on to some other point and take these alternative positions.

We will assume for the moment as we did in our pleadings and complaint that we were properly joined and properly subjected to the Court with the sale resulting in the divesting of the Federal liens. But it also leaves us with a one-year right of redemption.

THE COURT: Yes.

MR. COE: And as I stated in the opening facts which are borne out by the pleadings, the background material leading up to the tender which the Government made, at this point, then, I would like to call Mr. Robert Blair to the stand to offer evidence as to the fact of the tender made which would be the prerequisite to the right of redemption.

ROBERT X. BLAIR, called by and on behalf of the Government, being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COE:

Q. Mr. Blair, would you state your occupation?
A. I am a revenue officer with the Revenue Service.
Q. Which division or section?
A. Collection Division, Delinquent Account Returns Branch.
Q. Office of the District Director?
A. That's correct.
Q. Did you have occasion on or about January 3, 1957, to attempt to contact Francis Jacob?
A. Do we have it right here? Is it '57?
MR. JACOB: That is right
52 A. Well, I did, that is correct.

BY MR. COE:

Q. Did you succeed in contacting him?
A. We didn't succeed in contacting Francis Jacob, no.
Q. Would you state to the court the reason you were attempting to contact him?
A. We were attempting to deliver money to accomplish the redemption of the property.
Q. That was the property involved belonging originally to whom?

A. The property that was originally owned by the Parkmans and sold by the sheriff on January 3 of 1956 to William Brosnan and Francis Jacob.

Q. Did you then attempt to contact William Brosnan?

A. Yes, we did, and we succeeded in contacting him.

Q. What did you do when you contacted him?

A. We notified him of the purpose of our call, gave him the Government check to cover the amount that was bid at the sheriff's sale, pluns interest, and attempted to accomplish redemption of the property.

Q. You tendered him a check?

A. That's right.

Q. Drawn on whom?

A. The check was payable to the District Director of Internal Revenue. It was endorsed in blank by the District Director.

Q. And how did you calculate the amount; what did the amount consist of?

A. The total amount was made up of $6,203.23, which was the amount bid at the sheriff's sale, plus interest, and making the total amount we offered him $6,575.42.

53 Q. What was Mr. Brosnan's answer to your tender?

A. He indicated that he would not accept the check and certainly wouldn't be interested in redemption of the property when so small an amount was offered in the light of the amount he had invested in the property.

Q. Following your contact with Mr. Brosnan, did you make any further effort to contact Francis Jacob, the other purchaser?

A. We did. Mr. Brosnan referred us to William Jacob, his attorney, and we asked that he contact William Jacob and see if we could see him that afternoon, set up an appointment. Mr. Brosnan did that. He set up an appointment for three o'clock in the afternoon. We left Mr. Brosnan's place of business and went back up to the place of business of Francis Jacob, but he was not in.

Q. So at the end of the day you had spoken to Mr. Brosnan and he had refused your tender?

A. That's right.

Q. And you had made one further effort to contact Mr. Jacob?

A. That's right.

Q. And also on that day you were ready, willing and able at all times to deliver this check?

A. That's right.

Q. Drawn on the Treasury of the United States and endorsed—payable to the District Director and endorsed in blank?

A. That's right.

Q. Was it within your knowledge that the date upon which you contacted these people was within one year following the sale of this property?

A. It was.

54 MR. COE: Do you have any questions, Mr. Jacob?

MR. JACOB: Yes.

CROSS-EXAMINATION.

(Letter dated November 29, 1955, produced and marked Defendants' Exhibit 1.)

BY MR. JACOB:

Q. Mr. Blair, the day to which you make reference as having been to see Mr. Brosnan was January 3, 1957?

A. That's right.

Q. Is that right?

A. That's right.

Q. And the sheriff sale was held on January 3, 1956?

A. That's right.

Q. So you waited until the last day that the year would expire?

A. Well, we were in your office——

Q. Wait a minute. Is that true?

A. The day before the last day, the way we calculate it.

Q. You figured you had one day more?

A. That's right.

Q. Did you make any effort on the following day of January 4, 1957, to see Mr. Francis Jacob?

A. No, because you had indicated to us that you would not recommend to your clients that they accept the amount offered.

Q. Yes, because you had offered an inadequate amount, as I told you?

That's right.

55 Q. Yes. But you did not contact him to make any offer?

A. Made no effort to reach him the following day, no.

Q. And you never made any tender to Francis H. Jacob at any time?

A. That is correct. We tried to make it to him, but we weren't successful.

Q. You tried to make it on January 3, 1957?

A. That's right.

Q. And you knew where his place of business was, didn't you?

A. Oh, yes.

Q. Then you had known that for quite some time?

A. Yes. As early as May of 1956 we had notified him that we intended to attempt to redeem the property.

Q. So that from May, 1956, until January 3 of 1957, you knew where his place of business was?

A. That's right.

Q. And at no time between those dates did you contact him or tender to him any money?

A. No, not until our effort on the third of January.

Q. Pardon me?

A. Not until our attempt on the third of January.

Q. I show you here a letter that has been identified as Defendants' Exhibit No. 1. Is that your signature (handed to witness)?

A. That is my signature.

Q. So you did, then, furnish J. Wray Connolly with the information pertaining to the Government's liens against Mountain Engineering Company so that he could include them in the petition to Common Pleas Court to

56 comply with the Federal law leading to the divestiture of those liens?

A. That is my letter. I did not, or I do not recall furnishing him information on the specific liens. As Chief of the Special Procedures Section, we have many calls from attorneys for information how to get around the Federal tax liens, and one of the approaches to the problem is to follow the Internal Revenue Code and request a discharge of the property from the specific liens by filing applications with us. That was one of the avenues that was open and that is what that letter relates to.

Q. And the other avenue was to file their petition in Common Pleas Court——

A. Well, there is two other avenues.

Q. Yes.

A. The one is to join us in on the court action to foreclose under Title 28, Section 2410 of the United States Code. The other avenue is provided in the Internal Revenue Code, I believe it's Section 7425, and it makes provision for the person to request the Government to institute an action to foreclose its liens.

Q. That's right. But the procedure that was followed in this case was the petition filed in the Common Pleas Court and a rule granted and service made on the Government in Washington, D. C. by registered mail, and on John A. DeMay, Jr., Assistant United States Attorney here in Pittsburgh?

A. I am not aware of the service on it. I presume they did that.

Q. Yes. But that is the procedure followed in this case?

A. Yes, that was the procedure.

57

Offers in Evidence

Mr. Jacob: If Your Honor please, we will offer all of these records. I think it would be more in line with our defense rather than on cross-examination of this witness.

Redirect Examination

By Mr. Coe:

Q. Mr. Blair, you say you were employed in Internal Revenue Service?

A. That's right.

Q. And you have no authorization of any fashion to waive any rights of the United States?

A. I have not.

Q. Regardless of what you may write in letters?

A. That's right.

The Court: You don't say you give misinformation in the letter?

A. No.

MR. JACOB: He didn't give out any misinformation, Your Honor. He only did what the duties of his office permit him to do. And any lawyer——

THE COURT: I just made the inquiry.

MR. JACOB: Nothing wrong with what he did.

MR. COE: Oh, I am not saying there is anything wrong, Your Honor. I am saying regardless of what he said——

MR. JACOB: Nothing what he said was wrong either.

BY MR. COE:

Q. At the time that you interviewed counsel for Mr. Brosnan and Mr. Jacob in his office that you stated,
58 was any statement made as to the reason for declining the tender?

A. Mr. Jacob indicated that he didn't consider the amount offered, the amount of money involved even an offer of redemption and he would not recommend his clients even consider it in view of the amount. He indicated he was entirely in agreement that the Government should redeem the property on payment of the right amount, the amount he felt was right.

Q. Did he indicate what he felt might be the right amount?

A. Yes, he did. The figures he gave me that day were in the vicinity of $52,000, and he called the following day to tell me he had made an error in his calculations. He gave me a revised figure of $55,500-some dollars.

Q. I am not so much interested in the exact figure. Did he give any indication as to what these figures constituted?

A. Yes.

Q. Where he got them? What did he say? Itemize them.

A. The amount of the judgment as of June 7, 1955, plus interest on that amount, plus the amount bid at the sheriff's sale, plus the additional costs incurred in connection with getting his title, and the 1956 taxes on the property.

RECROSS-EXAMINATION

BY MR. JACOB:

Q. One other item, Mr. Blair, about the stamps that were put on the deed.

A. Well, I had lumped that into the additional costs involved in getting your deed. There were stamps and
59 the fee for the deed and so forth, all necessary in order to accomplish securing your sheriff's deed.

Q. Yes, but the figure that you quoted here as having been the amount of the check that was shown to Mr. Brosnan did not include the stamps that were required to be put on that deed, did it?

A. We based our amount——

Q. Just answer my question yes or no.

A. No, it didn't.

Q. No, it didn't, that is right.

FURTHER REDIRECT EXAMINATION

BY MR. COE:

Q. But from what you were told, adding the amount of stamps on there wouldn't have made any difference any way?

A. That is right.

MR. COE: That is all.

MR. JACOB: That is all, Mr. Blair.

Colloquy Between Court and Counsel

MR. COE: If Your Honor please, at this time the Government's first alternative has been presented, that the mortgage foreclosure procedures or judgment on the bond with writ of fieri facias was had, sale was held, property purchased, and within the time allowed by the statute, the United States tendered the amount of the sale.

THE COURT: Well, you haven't shown the amount of the sale, yet.

MR. COE: I thought the witness stated it.

60 THE COURT: Did you show the amount brought at the sheriff's sale?

MR. COE: Yes.

THE COURT: Was he there?

MR. COE: He wasn't there, but he stated it was the way they calculated the check.

THE COURT: He said they calculated it that way, but he didn't prove what the property brought at the sale. Maybe he did.

MR. JACOB: I have the sheriff's receipt, Your Honor, for the amount that was paid.

THE COURT: Well, wait a minute. The Government is in its case. You seem to have a different idea from the Government's idea, I would take it from your cross-examination, as to what redeem means. And I had understood from the Government's position here and Mr. Coe to say all the Government had to pay back, tender, was the amount paid to the sheriff at the time of the sale. Now, that is his position, he should prove that so we have that very clearly before the Court and know on what he wants to stand, that is all.

MR. COE: In Paragraph 15 of the answer, defendant Francis H. Jacob, the amount of the sheriff's sale is admitted.

THE COURT: All right. We haven't got anything of the complaint and answer in the record yet. If you say you have completed your case, that is what I understood you to say?

MR COE: It is taken as admitted.

61 THE COURT: You haven't put anything on the record in evidence in the complaint or the answer as yet. You don't have any evidence from the complaint or answer before me, not yet anyway.

MR. COE: Do you have the sheriff's certificate? Would you introduce it to establish that fact?

MR. JACOB: Yes, I will be glad to do that.

MR. COE: I have no objection.

MR. JACOB: It is agreed between counsel for the Government and counsel for the defendants, Francis H. Jacob and William J. Brosnan, that the amount that was paid to the sheriff was $6,608.38 for which the sheriff issued his receipt bearing that date, Serial No. 01553, and I hold the original receipt for the amount that I mentioned.

THE COURT: All right. Receipt was made to whom?

MR. JACOB: Receipt was made to me.

THE COURT: Who paid the money?

MR. JACOB: I did. I paid the money for and on behalf of William J. Brosnan and Francis H. Jacob. It was their money. And that is the amount mentioned in paragraph 15 of the answer to which Mr. Coe made reference.

THE COURT: Which you admit?

MR. JACOB: That's right.

THE COURT: All right, we will consider that in evidence.

MR. COE: In order to pass on to the argument on this point, it has been established as to the tender and
62 refusal thereof. If I may say, I think that the question turns on what is a right of redemption, and it is the Government's position that a right of redemption after a sale is a right to redeem from the sale at the sale price and nothing more. If I may anticipate counsel from the evidence that has been produced, it seems that the redemption would mean to him paying off the prior claims in its entirety. The statute itself makes no reference to defining a right of redemption. It merely says the United States shall have one year from the sale within which to redeem the property. And the history of the word——

THE COURT: We are not arguing the case.

MR. COE: Your Honor?

THE COURT: We are not arguing the case, we are taking the evidence.

MR. COE: I am just establishing this one point——

THE COURT: We haven't heard the defendant on that point.

MR. COE: That is the Government's position.

THE COURT: Have you put in all the evidence you want to put in on this side of the case?

MR. COE: Yes, we have, Your Honor.

THE COURT: All right. I think you better take up the next proposition and try the whole case at one time. Take up your next proposition, Mr. Coe.

MR. COE: All right. If Your Honor please, there is a point which has come to our attention that is not in our file. I would like a five minute recess to clear up this
63 thing in order to go on with the second section of the Government's claim.

THE COURT: All right, we will recess for ten minutes.

(Whereupon the Court recessed.)

After Recess

Offers in Evidence

MR. COE: If it please the Court, the second section of the Government's case involves the sufficiency of the procedures that were had in the Court of Common Pleas of Allegheny County to meet the requirements of the statute waiving sovereign immunity and subjecting the United States to the jurisdiction of the Court of Common Pleas.

I would like to mark this as Exhibit 1.

(Two appearance dockets produced and marked Government's Exhibits 1 and 2, respectively.)

MR. COE: I offer in evidence certified copies of the docket entries from the Court of Common Pleas of Allegheny County, T.D.S.B. Docket, which will set forth the procedure and the facts involved in the confession of judgment which was entered against the Parkmans, and the fact of the assignment of the judgment to Mr. Brosnan and Mr. Jacob.

THE COURT: Any objection, Mr. Jacob?

MR. JACOB: No, Your Honor. Right in connection with that, so that the sequence may be reserved, I would by agreement of counsel like to offer with that the
64 petition to join the United States of America as an additional defendant.

MR. COE: I think that would come after this one.

MR. JACOB: Is that the next one?

MR. COE: Yes.

MR. JACOB: All right, put that in.

MR. COE: And as Government's Exhibit No. 1 has entries for the execution docket for the Court of Common Pleas of Allegheny County, certified copy, it will list the sequence of events of the writ of fieri facias, including the tax liens, issuance of the rule to show cause, petition to join the United States, which Mr. Jacob will give actual copies of.

(Assignment of mortgage produced and marked Defendants' Exhibit 2.)

Colloquy Between Court and Counsel

THE COURT: Gentlemen, I take it from this there was judgment on the bond filed in the Common Pleas Court on June 7, 1955. Is that right?

MR. JACOB: That's right.

MR. COE: There is one particular fact that the Government would like to point out contained in its two exhibits, the amount on the sheriff's return from the execution sale differs from the amount upon the receipt which Mr. Jacob introduced into evidence, and it was based——

THE COURT: Wait just a moment. I want to look at No. 2 so I can get this thing straight. The fieri facias on the judgment confessed on the mortgage bond was
65 issued when? When was that issued, Mr. Coe?

MR. COE: I don't have that date right here. June 7, 1955.

THE COURT: Same date that the judgment was entered, is that it?

MR. COE: Yes, June 7, '55, same date as the confession of judgment was entered.

THE COURT: Then I take it, Mr. Jacob, there were two continuances, and on September 22, 1955, petition was presented in open court and the rule was granted on the United States and upon the two Parkmans why the United States should not be made a party to this proceeding?

MR. JACOB: That's right, Your Honor. And I have that petition in its entirety here together with the order of court.

THE COURT: Wait just a moment. October 6, affidavits of service of petition by registered mail on defendants and on Attorney General of the United States of America filed. There was a return of service on September 28, served on the United States of America as additional party at their place of business, Federal Building, Grant Street, Pittsburgh, Pennsylvania, by handing to John A. DeMay, Jr., Assistant U. S. Attorney in charge thereof for the time being, a true and correct copy of the within petition and rule making known to him the contents thereof.

What does the statute say, so that we can see if we have the right service or not?

66 MR. COE: That is the right service, Your Honor.

THE COURT: You concede that is the right service?

MR. COE: I think it did show it was by registered mail on the Attorney General.

THE COURT: And service on the Assistant United States Attorney locally.

MR. COE: Yes, sir.

MR. JACOB: That's right.

THE COURT: And I take it, then, that there was no answer by the United States, Mr. Jacob?

MR. JACOB: That is right.

THE COURT: No answer by the United States. So on December 5, you had your rule made absolute——

MR. JACOB: No, Your Honor, on December 20, 1955, we had the rule made absolute.

THE COURT: On December 5, on motions sale postponed to first Monday of January, 1956. I see, yes.

MR. JACOB: That's right.

THE COURT: And on December 20, you had your rule made absolute.

MR. JACOB: That's right.

THE COURT: The docket entry is that the United States is "hereby joined as a party defendant to the end that taxes due the United States of America enumerated in said petition and the tax lien in favor of United States of America subsequently filed October 13, 1955, in
67 Prothonotary Office of Allegheny County at No. 13623, being additional income tax for the year 1948, 1949, 1950, in the amount of $9,767.68 against said George Parkman, Jr. and Marie Parkman shall be divested," and so on.

MR. JACOB: That's right.

THE COURT: Is that the only taxes we are talking about, the taxes at that time against George Parkman?

MR. JACOB: That's right.

THE COURT: Mr. Coe?

MR. COE: Yes, sir, and Marie Parkman.

THE COURT: Well, yes, both Parkmans.

MR. COE: And the petition also alleges taxes against Mountain Engineering Company, a corporation, controlled by the Parkmans.

MR. JACOB: If Your Honor please, in that connection the order of court stated that the taxes due the United States of America enumerated in said petition and the tax lien in favor of the United States of America subsequently filed October 3, 1955, in the Prothonotary's Office at that number, being additional income tax for the years '48, '49 and '50 in the amounts of 9767.68 against George Parkman, Jr.,

and Marie Parkman shall be divested by the sale of real estate described in said petition being made by the sheriff of Allegheny County, Pennsylvania, January 3, 1956, after which sale the said real estate so sold shall be free and clear of all liens.

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Offers in Evidence

And in connection with the offer that the Government made, I wanted to offer in evidence the petition referred to in that transcript and the order of court thereon dated December 20, 1955.

(Petition and order of court produced and marked Defendants' Exhibit No. 3.)

Colloquy Between Court and Counsel

THE COURT: Do you contend that that procedure take by the attorneys here, Mr. Coe, was not in compliance with 2410?

MR. COE: We contend that the entire procedure, Your Honor, is not—at least I think you are referring to the service requirements?

THE COURT: The whole procedure.

MR. COE: Yes, we do.

THE COURT: Why do you? Where is the defect?

MR. COE: We admit that the service requirement was met, we admit the petition was served upon us and contains the interest of the United States with particularity, which is one of the requirements. But the third requirement of the statute is that there be a judicial sale to divest the Federal liens. And we maintain there has been no such judicial sale.

THE COURT: What do you call a judicial sale?

MR. COE: Sale by order of court, by direction of the court and returnable to the court. A sale which was had here was an execution sale pursuant to writ of fieri facias, which the sheriff made the same subject to no confirmation, the Court had no control over it, no control over the distribution of the proceeds. Even if, as the rule to

69 show cause was that the United States be made a party defendant, and if we failed to answer, which we obviously did not do and we were made a party defend-

ant, we still never had an opportunity to litigate our liens because no money was ever returned to the Court, no opportunity was given to set up priorities. And under the procedure established here there is no opportunity given, the follow up of an execution sale in Pennsylvania law, the sheriff just distributes the money according to the lien list which are prepared by the attorneys for the mortgagee submitted to him, which does not meet the requirement that the Court take under its control the conduct of the sale and the distribution of the proceeds.

And by the very wording of the statute, only the judicial sale itself divests the liens and not an order of court.

THE COURT: Do you have Pennsylvania authority on that, Federal authority?

MR. COE: On which?

THE COURT: On the subject you are talking about?

MR. COE: Yes, I do, Your Honor.

THE COURT: Your foreclosure sale is not a judicial sale.

MR. COE: An execution sale. I have general authority on it. We would like an opportunity to submit a brief in which we would specify separate cases on the subject. We also have Federal authority to the effect that a foreclosure proceeding which does not result in a judicial sale, such a strict foreclosure does not meet the requirements of the statute. It was a New Jersey district court decision——

THE COURT: Well, your point is, as I understand it, that because you didn't answer, thus indicating to the Court that there be no contest on the point, nothing to litigate, the Court simply directed them to go ahead with the sale as originally started. If you had answered and said Yes, you wanted the liens protected, that would have given the Court an opportunity to draw an order directing the proper sale and return made to him. Not having filed any answer whatsoever, not having done anything, not having appeared, having ignored the whole thing, does the Court then have to go about and go through an empty process in order to divest the liens of the Government, or can it go ahead and say the Government is not interested, go ahead with the sale, they had an opportunity. The main instrumentality there is notice. The purpose of it is notice to the Government, give opportunity to the Government to

come in, and as you say contest the liens and the right of distribution before the Court.

MR. COE: But there is no way to contest the right. If we had answered in this particular case under the procedures evolved, these execution sales, we would have answered—this is speculation, of course, not having done so—all we would have done was set up our liens. We would have admitted jurisdiction. And the sheriff would still have gone ahead with his sale, because that was under the right of the fieri facias——

71 THE COURT: You still had the opportunity to come in and contest the sheriff's distribution.

MR. COE: After it was made?

THE COURT: Sure, after the sale. He doesn't make distribution at once. Isn't there an opportunity in the county court to contest the sheriff's distribution of the fund?

MR. JACOB: Oh, yes, Your Honor, and Mr. Coe stated there was no confirmation of the sale. There definitely was and it must of necessity be in every sheriff's sale.

THE COURT: The sheriff makes a return?

MR. JACOB: For the past forty-two years that Leonard McMillin has been with the sheriff's office, we have never had an instance where there hasn't been sales that conform to the procedure followed here where there is a Government lien. We have followed it to the letter of the law right straight down the line. And I think Mr. McMillin was down this morning and told Mr. Coe, gave him all that information.

THE COURT: That has been the practice in Allegheny County.

MR. JACOB: That has been the practice all the time.

THE COURT: Confess the judgment first——

MR. JACOB: Then issue your execution.

THE COURT: Then make the government a party.

72 MR. JACOB: Yes. Then you bring the Government in just like they did here. They can stay their proceedings and bring the Government in. The Government has the opportunity to come in and bid on the property and protect themselves. They are a junior lien. And then in order that the Government might have the opportunity of doing that very thing specifically, you give them this notice. That is the very purpose of this notice.

Then in order to make real estate freely salable so that it won't have a cloud over it all the time with these liens, the procedure was adopted here, the statute was enacted wherein and whereby the Government would submit itself to the jurisdiction of the states. But under those conditions, they must be given notice of everything. They have sixty days within which to file an answer and copy of the petition be sent to Washington and to the District Attorney here in this District. What more could you do? I don't know. There isn't anything more.

We have done all of that. And certainly this court isn't going to set aside the practice that has been going on here since Pennsylvania was a state. We inherited our laws from England, and this was the procedure that has been adopted from time immemorial on a foreclosure of a mortgage, one of the oldest type of real estate procedures that we have.

THE COURT: Of course, what Mr. Coe is hanging his hat on now is the words "judicial sale." Is that right?

MR. COE: That is right.

73 THE COURT: I take it the Government admits the procedure outlined, failure to answer and all that sort of thing, but you just simply say that it was not a judicial sale.

MR. COE: I think, as I stated before and as Your Honor has put it, these requirements to bring the Government into one of these suits, and unless the procedure that the state has meets these requirements——

THE COURT: I am trying to find out what you are kicking about, what you are contesting. As I understand it, the only point you raise relates to the words "judicial sale" in the statute, admitting everything that the people did, and it is still not a judicial sale.

MR. COE: As I understand Pennsylvania procedure, after the sale is held and after the lien lists are submitted, the liens aren't even submitted to the sheriff until after the sale is held. Then he makes his return which allows the Prothonotary's office ten days as I understand it.

MR. JACOB: That's right, for exceptions to be filed.

MR. COE: For exceptions to be filed, which puts a burden upon any entity, particularly of the United States, to

have to trot down to the Prothonotary's office and look it up. We maintain that is not the proceeding.

THE COURT: It is a question of whether they should come to you or whether you should go to them. Is that what you are saying?

74 MR. COE: That gets down to a simpler matter. It is a difficult problem in order to take this general Federal statute which has to be applied uniformly throughout the Union and adapt it——

THE COURT: What you are asking me to do is upset forty years of title companies and the companies may have——

MR. JACOB: It would create such confusion we would have nothing here.

MR. COE: Well, we have a uniform procedure in Massachusetts never joining these sales because they have nothing like a judicial sale——

THE COURT: Well, many states have no such thing. Pennsylvania is one of the few that has confession of judgment.

MR. COE: True.

THE COURT: We have confession of judgment in the Federal court. Judgments are confessed down here in our courts. We have nothing against a judgment. Because it is based on a confession rather than statute, it says a complaint must be served upon the government. I think a complaint is simply a pleading and doesn't make much difference, the way I view it, whether it is a formal complaint or rule to show cause or petition or what it is.

MR. COE: We will go along with that. But it gets down, does the preceeding in its entirety, the culminating factor make a judicial sale which provides money and which all of us have to look to satisfy our claims, if there is enough? But under these proceedings, it is not a judicial sale.

75 THE COURT: To go along with you, with the Government in this proceeding, requires then, as I see it, that in every instance where there is a Government lien on property with a prior mortgage ahead, prior, you can't foreclose in the usual way in Pennsylvania in accordance with the terms of your instrument. You have to come into court and start a proceeding there under the direction of the court. I have always understood the sheriff's sale on a mortgage where it is confirmed by the court under the

rules of the court, not necessarily brought into the judge for signature, but it is confirmed because no exceptions are filed, is a judicial sale. That is my view of it. I would like to see decisions or authority where that is not a judicial sale. I think it is a judicial sale where you have to sell pursuant to an order of court.

MR. JACOB: That's right.

THE COURT: You don't get that fieri facias except under rule of the court.

MR. COE: I say we can cite general rules if we have permission to file a brief. We will cite specific cases.

THE COURT: Yes.

MR. COE: In Corpus Juris Secundum Three, under executions, an execution sale is to be distinguished from a judicial sale in that execution sale an officer who sells gets the authority by virtue of the execution and is guided in the sale by the law rather than the court, where in a judicial sale the court controls. Executions usually require no confirmation. Execution is based on judgment for a sum of money, while judicial sale rests on an order to sell a specific property. In an execution sale, the sheriff is
76 the real vendor, in the judicial sale the court is.

The line is drawn quite clearly.

THE COURT: Under what you have right there, part of it is in Pennsylvania and part not.

MR. COE: True. In fact, as we understand it, even the property involved to be sold under the writ of fieri facias is determined by the attorney who hands it to the sheriff. The writ of fieri facias doesn't even list property. And the attorney furnishes him the list of the property to be sold which, as I would understand the proceeding and talking with Mr. McMillin this morning, he is not even bound to take on the mortgage property unless it is limited in the judgment and bond. But the decree of the court contains no reference to the property.

THE COURT: Of course, we had a decree of the court here directing sale to proceed, delaying the sale and then directing it to proceed.

MR. COE: And also, as I understand the Pennsylvania procedure that this particular business of notice to the United States was adapted merely to try to meet the requirements of the Federal law and has no sanction in

Pennsylvania law. It is not a proceeding which any other creditor would be entitled to.

THE COURT: I think that is true.

MR. COE: And we submit again that in trying to apply this law universally throughout the Union, the fact that one state's longstanding procedure conflicts with it is no ground to change the Federal law, because——

77 THE COURT: Wait a minute. The Federal Government recognizes state practice in this regard. Of course, it is a Federal question whether or not it complies with the Federal statute. So we don't advocate our function by saying if Judge Weiss says it's so, it is so. I am not saying that. I don't do that. It is a Federal question whether or not the state practice is in conformity to this statute, proper notice and so on.

MR. COE: We can't change the state practice, but unless it conforms, we are not bound by it and they are no worse off than before the enactment of the statute itself.

THE COURT: My view at present would be that that is a foreclosure sale on the bond and mortgage, and I think the practice here that is shown by this record indicates sufficient compliance with this section, except, if of course it is not under Federal decisions not a judicial sale, that is a different proposition. I am surprised that it isn't. Maybe it isn't. I am very often surprised on what the law is.

MR. COE: Well, that completes our case.

THE COURT: Then there is no dispute really about the facts.

You have completed your case, I take it, Mr. Coe?

MR. COE: Yes, Your Honor, we have completed it.

Defendants' Motion to Dismiss the Petition of the Government

MR. JACOB: At this time, Your Honor, I would move to have the petition of the Government dismissed for the reason that the allegations of the complaint have not

78 been proven and that no tender has been made; first of all, that the record offered into evidence here shows that the two defendants are the owners of the real estate in question as tenants in common and that no tender at all or no offer was made to the one defendant, namely, Francis H. Jacob. And further that the amount of the

check was shown to William J. Brosnan was not the amount that the law requires to enable the Government to exercise its right of redemption. It is our contention under the Pennsylvania law that for the Government to redeem they would have to make the owners whole and would have to tender them the amount of their judgment with interest and costs and the taxes which they paid.

THE COURT: Well, now, Mr. Jacob, it is like a tax sale, isn't it? They just take away that which has been held and leave you people with your bargains, leave the situation in status quo, isn't it?

MR JACOB: Yes.

THE COURT: That isn't your idea of redemption?

MR. JACOB: No, sir, that is equivalent—it is more vicious than that—that redemption is equivalent to another purchase. Just think of what could have happened in this case. They tender us less than the amount—this is only argument—they made no valid tender at all. But they offered an amount even less than what we paid the sheriff to get the deed. Then if they—let's say that they prevailed and got the title to the property for that small amount. We have lost $49,000. They would pay us around $6,000 and we had in the property $55,591.28. And there is no
79 procedure wherein and whereby we could ever get our money back from the Government. It had taken the property over.

THE COURT: Isn't the public sale price established on the sale under your theory that it is a property worth $50,000 and goes for six as the figure they are talking about?

MR. JACOB: No, Your Honor. It has been the custom and practice of the sheriff of all of the counties, particularly Allegheny County in the State of Pennsylvania, that your first bid is a nominal bid of your costs and taxes. If there is any other bid, then you immediately go up, or go up to the amount of your debt and your interest and your costs and your taxes. And if the Government had come in and bid on that property, then we would have paid $55,591.28. If they had paid $56,000, if they had bid $55,591.28, they would have had the property and they would have had our money out of it and they would have

had the property. Then they could hold the property and sell it to any person else to liquidate their liens for taxes.

THE COURT: What was the amount of the check tendered?

MR. JACOB: The amount of the check was——

THE COURT: Or offered?

MR. JACOB: The amount that was just offered was $6,575.42. And mind you, that was just a check shown, and I will have it in evidence here to show how that was presented to Mr. Brosnan. And it is our further contention that if you have property owned by tenants in common, you have to deal with each as an individual owner.

THE COURT: That isn't necessarily the proposition, is it? That is salable, that interest is salable, subject to liens and so on, an undivided half interest.

MR. JACOB: Yes, that is exactly right. They are tenants in common, therefore, you have to deal with them——

THE COURT: You can tender to one for that half.

MR. JACOB: No.

THE COURT: Can't this case wind up with having a sale on Mr. Brosnan's share and not the other?

MR. JACOB: I don't think so.

THE COURT: Suppose there is a tender as to one? I can see where there would be a tender as to one and not the other.

MR. JACOB: They were intending all the way through and I think they still contend their petition states that they were intending to get back the whole property, not an undivided one-half interest. They never attempted that.

THE COURT: That wouldn't have made any difference if they made a tender, they made a tender, I am not sure about that, but I just raised that question.

Well, you asked to have it dismissed. I am going to refuse that motion. I want to hear the plaintiff on the case.

MR. JACOB: Yes.

THE COURT: Go ahead.

MR. JACOB: You will grant me an exception, of course?

THE COURT: Yes.

MR. JACOB: Mr. Brosnan.

WILLIAM J. BROSNAN, called as a witness by and on behalf of defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOB:

Q. What is your name?
A. William J. Brosnan.
Q. Where do you live?
A. 143 South Dallas Avenue.
Q. Where is that?
A. What's that?
Q. Pittsburgh?
A. Yes, sure, Pittsburgh.
Q. And what is your business?
A. A jeweler.
Q. And where is your place of business?
A. 606 Homewood Avenue.
Q. Pittsburgh, Pennsylvania?
A. That's right.
Q. And how long have you been a resident of Allegheny County, Pennsylvania?
A. Thirty-five years.
Q. You and Francis Jacob are the owners of this property that is the subject of these proceedings?
A. That's right.
82 Q. And on January 3, 1957, do you recall when Mr. Blair came to your place of business?
A. I do.
Q. And did he offer you any money; did he offer you any money?
A. No.
Q. What did he show you?
A. He had a check that he showed me that was made out to the Internal Revenue, and he showed me where it was endorsed in blank, told me for the amount that it was, and he said it was in payment for the property. So I immediately told him that it wasn't enough, it wasn't even what we had paid the sheriff. And he didn't know the exact amount—if he wanted to get in touch with my attorney he could find the right figures.

MR. JACOB: Cross-examine.

By Mr. Coe:

Q. One thing, Mr. Brosnan. Based on your answers to Mr. Blair, do you think that he was acting right when he didn't run out and cash the check and bring back $6,500——

A. I didn't question that at all.

Q. It wouldn't have made any difference if he had offered $6,000 in cash?

A. No.

Q. He gave you a Government check. He was prepared to give you a Government check, is that it?

A. I didn't question the check at all; only the
83 amount.

Redirect Examination

By Mr. Jacob:

Q. Did he give you the check?

A. No, he didn't. He had the check laying on the counter and he did turn it over for me to see.

The Court: Did he hand it to you and say here——

A. No, I didn't have the check in my hands at all.

By Mr. Jacob:

Q. What did you say? You were talking when the Court was talking.

A. I didn't have the check in my hands at all. He turned it over to me to see the endorsement.

The Court: What did he say? I didn't understand quite what he said.

A. Well, he said that he was representing the Government on this case and he had a check for me for the amount of $6200. I don't know the exact amount. But I said to him, "Well, that isn't as much as we paid the sheriff." And I said, "Besides, I have mortgage money there. How am I going to get reimbursed?" Well, he said, "That's up to you."

The Court: Well, did he say the fund was yours alone or did he say that was to be divided between you and Mr. Jacob or what?

A. He didn't specify.

The Court: Didn't say anything about it?

A. No.

Mr. Jacob: That's all.

84 FRANCIS H. JACOB, called as a witness by and on behalf of defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOB:

Q. What is your name?
A. Francis H. Jacob.
Q. And where do you live?
A. 3511 Laketon Road, Penn Hills.
Q. Is that in Allegheny County, Pennsylvania?
A. Allegheny County.
Q. And what is your business?
A. I am a realtor, real estate, general real estate business.
Q. With what company?
A. The T. E. Clinton Company.
Q. Where is that?
A. 718 North Homewood Avenue, East End.
Q. Is that a corporation?
A. That is a corporation.
Q. And what office do you hold?
A. I am president of the corporation.
Q. And how long have you been associated with the T. E. Clinton Company?
A. Oh, over thirty years.
Q. And where is the T. E. Clinton Company's place of business located?
A. Main office is 718 North Homewood Avenue, East End section of the City.
Q. Where is the other office?
A. Penn Township on Laketon Road, 3511 Laketon Road.

85 Q. How long has the office of the T. E. Clinton Company been at 718 Homewood Avenue, Pittsburgh, Pennsylvania?
A. On Homewood Avenue, roughly about thirty years on Homewood Avenue at that address.
Q. Was any tender ever made to you by the Government—strike that. Are you and William J. Brosnan the owners of the property in question here as tenants in common?
A. Yes.

Q. And you acquired that——

A. We acquired that property as a joint venture.

Q. You acquired title of the property through the sheriff's sale we have been discussing here?

A. That is correct.

Q. And has the United States Government or any person acting for or on behalf of the Government at any time made a tender to you of any money with a view toward redeeming this property?

A. No, I have never been contacted by the Government or any of their representatives.

MR. JACOB: Cross-examine.

CROSS-EXAMINATION

BY MR. COE:

Q. Mr. Jacob, were you aware at any time that the United States Government was contemplating redemption of this property after you had purchased it?

A. No.

Q. You had no knowledge in any shape, form or fashion——

A. Well, I had an idea back in, oh, I think it was about maybe a year prior to that that the Government
86 may—nothing definite—make an attempt to exercise their right of redemption.

MR. COE: Thank you.

REDIRECT EXAMINATION

BY MR. JACOB:

Q. What was the amount that you and Mr. Brosnan had invested in this property on January 3, 1957?

A. $55,591.28.

Q. And how was that broken down?

A. Well, the debt at D.S.B. was $43,142, interest from 6-1—June of 1955 to January 3, '57, $4112.11——

THE COURT: That is mortgage debt, isn't it, the first D.S.B., that is a mortgage debt?

A. That's right, that is judgment.

THE COURT: Well, that is based on the mortgage as I understand it, that is where the indebtedness arises?

A. That's right.

THE COURT: All right.

A. Then interest on that from June 1 of 1955 to January 3, of '57, amounting to $4112.11. Then costs paid at the sheriff's sale amounting to $668.38. Then we figured interest from January 3 of '56 amounting to $396.50, and taxes, 1956, amounting to $1340.29. The total sum amounted to $55,591.28.

BY MR. JACOB:

Q. That was the amount as of January 3, 1957?

A. That is correct.

87 BY THE COURT:

Q. Is your name in the telephone directory of the City of Pittsburgh?

A. Yes, sir.

Q. At that address where you live now?

A. Yes, sir.

Q. How long has it been in the directory?

A. I have always had a phone.

Q. Have you been there the last seven or eight years?

A. Yes.

Q. Four years?

A. That address I have been there for the last six years. And at my office, why, it's been over thirty years.

Q. Does the telephone directory list your place of business under your personal name?

A. It lists our place of business, then also a listing of the personnel in connection with the corporation.

Q. So that your name is under the corporate listing?

A. That is correct, as well as our salesmen.

THE COURT: That is all I have gentlemen.

MR. JACOB: That is all.

RECROSS-EXAMINATION

BY MR. COE:

Q. If I may ask one more question. To the best of your knowledge, were you in the City of Pittsburgh on the third of January, 1957?

A. Yes, sir, I was.

Q. Either at your office or your home?

A. Beg pardon?

88 Q. Either at your office or your home sometime during that day, the business day?

A. Oh, yes. I am in and out. I am in and out of my office. Our office is in the eastern section of the City, and there are many, many times when I am out in the eastern section, eastern vicinity, and naturally I can't be out there and back in the office at the same time. We service property in Monroeville and out through the eastern boroughs. And I travel in-between both offices. As far as I know, I was in the City and I was available. I was not unavailable.

Q. You stated in answer to an earlier question that I asked you that you were aware or had some knowledge that the Internal Revenue Service was contemplating redemption of this property for a period of time before this particular day. Did you at any time prior to that discuss this matter with your attorney?

A. No, not particularly.

Q. Well, you mean not particularly——

A. Well, frankly, I didn't pay too much attention to it. I had heard a rumor or hearsay that the Government may exercise—may come in at the end of the year and exercise the right of redemption, and if they would exercise the right of redemption I know there wouldn't be a thing that I would be able to do to stop it.

Q. You didn't discuss it in any way with your attorney, how much should be paid or what you considered or he considered the right of redemption to be? In other words, you had a substantial investment in this property——

A. I just naturally assumed the United States Government, being the United States Government, wouldn't come

in and try to rob an individual of moneys he had
89 invested and try to divest his interest. My answer to that would be no as far as the amount was concerned. I just assumed.

Q. But you never discussed it with him in detail?

A. In detail I would say no.

Q. You never gave him any authority of any sort to speak for you?

A. No, sir.

Q. Did you appear personally at this sale?

A. Yes, sir.

Q. Did you make the bid in person?

A. Yes, sir.

Q. You made a bid, then, of some $6,000 for property worth some $50,000?

A. Now wait a minute. You know better than that.

THE COURT: That is argument.

A. We bought a judgment, purchased that mortgage.

THE COURT: You are arguing with the witness.

MR. COE: No, Your Honor, I just asked him if he made the bid, some knowledge of its value.

THE COURT: You put two questions in one, the $6,000 and the $50,000. That is starting an argument.

MR. COE: I will strike the question, then, both of them. Let me rephrase it.

BY MR. COE:

Q. You did make the bid of $6,000 or concurred in the bid for $6,000-some odd dollars?

A. That is correct.

Q. And at the time you made the bid, you had
90 knowledge that the property was worth substantially in excess of that amount?

A. At the time I made—at the time the bid was made, I naturally knew that the property was worth more than the $6,000, because we had already had with that $6,000 in there $55,000 of our own money.

Q. Having put the bid in, were you aware that the United States had a right to redeem that property?

A. Yes.

MR. COE: No further questions.

MR. GOOD: May I ask a question?

THE COURT: I thought you were out of it? You admitted liability. I don't think you can ask any questions. You admitted you have no controversy.

MR. GOOD: That is correct, I have no controversy with the plaintiff, Your Honor.

THE COURT: Well, how do you get in on the side of the Government or any place?

MR. GOOD: Your Honor, I am in as counsel for the defendant.

THE COURT: You don't contest anything, as I understand it. You told me you were with the Government.

MR. GOOD: That we do not contest any of the allegations of the complaint.

THE COURT: You made the statement that you were on the Government's side.

MR. GOOD: That is correct, Your Honor.

91 THE COURT: The Government has examined the witness, so I think the Government is acting for you. I am sorry to say that, but that is your own position.

MR. GOOD: Very well, Your Honor.

Offer in Evidence

MR. JACOB: If Your Honor please, in further connection with the defense of this case I would like to offer in evidence the proceedings at No. 109 July Term, 1957, in the Common Pleas Court of Allegheny County, Pennsylvania, which proceedings briefly were——

THE COURT: You better have them numbered so we know what papers you are talking about. Have them marked as an exhibit.

(Complaint produced and marked Defendants' Exhibit No. 4.)

MR. JACOB: I would like to offer Exhibit 4, being a complaint that was filed by George H. A. Parkman and Gladys Marie Short Parkman, his wife, against William J. Brosnan and Francis H. Jacob, being In Equity, wherein and whereby the Parkmans contested the validity of the sheriff's sale, and our Common Pleas Court, after hearing arguments on the matter, dismissed this complaint and by order of court affirmed title into these two defendants, William J. Brosnan and Francis H. Jacob.

And if the Court please, I will furnish the Court with a certified copy of that final order of court so that the Court would then have the matter completely in front of it.

92 In addition to that, I would also like to offer in evidence——

MR. COE: If Your Honor please, I would like to take one of these exhibits—I would like to take these exhibits one at a time unless they are all connected together, and ask Mr. Jacob what the purpose of bringing them in, these collateral proceedings?

MR. JACOB: It is to show to the Court that an attack was made on the sheriff's sale by the Parkmans and that throughout this whole proceeding they have acted as if the Government was behind them on this whole case. And furthermore, I would like to state on the record that I have been informed that a deposit of money was made with the Government looking forward to the Government redeeming this property and then turning it over or selling it to another prospective purchaser. And it is my contention that that is an improper procedure.

Now, I am prepared to call Mr. Blair, if he is here in the courtroom, if he isn't, then I can call Mr. Good, he knows the facts about that angle of it.

THE COURT: Well, you are in your case, you can call anybody you want to call. I don't hear any objection at this point.

MR. JACOB: Mr. Blair.

ROBERT X. BLAIR, recalled by defendants, testified as follows:

DIRECT EXAMINATION.

BY MR. JACOB:

Q. Mr. Blair, would you state whether or not there
93 is a deposit of funds made with the United States Government in connection with this property that was foreclosed?

A. We have had deposits at different times, persons who would be interested in bidding for the property in case we exercised our right of redemption.

Q. And how much was the deposit?

A. We have had different amounts. One person came up with $7,000, another person came up with $40,000. There have been different offers.

Q. And who made the $40,000 deposit?

A. A man by the name of Spohn.

Q. And who brought him to your office?

A. Mr. Parkman introduced me to him.

Q. And the purpose of having that deposit made was that if the Government got this property back from Brosnan and Jacob, then they would sell it to this man that the Parkmans brought in?

A. The purpose of attempting——

Colloquy Between Court and Counsel

MR. COE: I would object to that.

MR. JACOB: What is the reason?

MR. COE: What are you driving at? This is entirely collateral.

MR. JACOB: It may be. But it strikes me that nobody should ever attempt to use the tremendous power behind the United States Government for individual purposes. And that is what I think has been done here to harass these two defendants. I also want to show and will show by this subsequent proceeding that it was necessary for us to institute quiet title proceedings to have the Parkmans ousted from the property. Not only did they not pay the
94 Federal taxes, they never paid rent to us and we couldn't levy on anything they had because the furniture that they had in there was even on a lease.

Now, here we have on the other hand taxpayers——

THE COURT: Well, now, Mr. Jacob, the point is, I take it even a redemption doesn't give the Government title, does it? Suppose the Government redeems this property. What title do they have to sell?

MR. JACOB: They redeem this property, Your Honor. I take it that they take over lock, stock and barrel the property, and we are out.

THE COURT: Under the theory, then, that the sale would divest all liens against the property, the sale is still to your clients?

MR. JACOB: Yes.

THE COURT: And if they redeem it, it doesn't transfer title to the Government, as I understand that redemption,

it just does away—I don't see where they get title. They just restore the status quo.

MR. JACOB: I don't think you can restore status quo because under Pennsylvania law if we don't proceed within six months,——

THE COURT: In other words, they keep their lien intact whatever it was, which is subject to the first mortgage lien.

MR. JACOB: No, our first mortgage lien is gone.

THE COURT: Under your own proceeding?

MR. JACOB: Right. Our first mortgage lien is gone. And we would have no lien any more, because we can't
95 even file for a deficiency judgment because the Pennsylvania law if you don't do that within six months, then you are presumed that the property you took over has the value of the judgment that you had against it.

THE COURT: I still don't see how the redemption puts the title in the United States.

MR. JACOB: Well, frankly, I don't know. But if they redeem, as I understand redemption, you do take over, because if you followed the old equity of redemption, if you don't waive your equity of redemption——

THE COURT: Redemption was the right given in the old days to the property owner.

MR. JACOB: He redeemed.

THE COURT: Now, the Government has the right to redeem, to restore its status of lien by paying off something.

MR. JACOB: They have to make the prior owner whole. That's what we always had to do in equity of redemption under mortgage. If we wanted to redeem, we had to come in and tender the amount of the debt, the interest, the costs and taxes. They didn't see fit to do that.

THE COURT: If you are correct on that, the whole proceeding failed because they admitted they didn't give anywhere near that.

MR. JACOB: Right.

THE COURT: I don't see where it is necessary to go into this proposition. It doesn't seem to me this is going to help us solve the difficulty.

96 MR. JACOB: Probably not.

THE COURT: The Government either does or does not have the right to do things under the act by statute.

If it does, regardless of the harm and fault and all that sort of thing, they can do it. Sometimes we think the Government ought to be magnanimous. It isn't always that way.

MR. JACOB: Oh, no, no. This is off the record, but it was our contention here and it still is that if the Government felt that this property had the great value, they should have come in and bid on it at the sheriff's sale like anybody else.

THE COURT: I don't know what that sentence means in that statute, I am frank to say. We will have to make a decision.

I think this testimony, Mr. Coe, is collateral and I think I will sustain the objection to it.

MR. JACOB: This wasn't just raised by me today, Your Honor. I put it in my answer. Since Your Honor ruled on it, it is agreeable to me.

THE COURT: Yes. You have offered one exhibit here, the complaint, Defendants' Exhibit 4. Do you have any objection to that, Mr. Coe?

MR. COE: The complaint in the so-called——

THE COURT: Equity case.

MR. COE: I have no objection to it, Your Honor. I would like the record to show that we think it is not material. But if he wishes to put it in, we have no objection.

97 MR. JACOB: And I will supplement that with the order of court, Your Honor.

THE COURT: The final order. All right.

MR. JACOB: Will Your Honor bear with me so I can consult with my client and see if there is anything additional?

MR. COE: Mr. Blair, I will call you again as a Government witness with Mr. Jacob's indulgence.

MR. JACOB: Yes.

ROBERT X. BLAIR recalled as a witness by the Government, testified as follows:

DIRECT EXAMINATION.

BY MR. COE:

Q. At the time you stated in your previous testimony that you went into the Brosnan place of business to affect

this tender, did he pick it up while you were in there and presenting this check to him?

A. He had the check in his hands. He turned it over and looked at it, held it for several minutes before he returned it.

MR. COE: Thank you.

BY THE COURT:

Q. You weren't going to give it to him, were you?

A. Yes. In fact, we were preparing to go out and turn it into cash if he raised objections on that.

Q. Were you ready to turn that check over to him without that other man being there?

A. Yes. And we told him we had a man waiting up in the other office attempting to reach Mr. Jacob.

98 Q. You were prepared to give Mr. Brosnan—which one was it, Brosnan?

A. Yes.

Q. You would have given him that check for the whole amount?

A. Um-hum.

Q. What did you want from him in return?

A. Redemption of the property.

Q. Signed by whom, or what do you mean by that? What did you have in mind by redemption?

MR. COE: The redemption that we had in mind——

THE COURT: Wait a minute, I am asking the witness.

MR. COE: I am sorry, Your Honor, you were looking straight at me.

BY THE COURT:

Q. What did you have in mind that you would get in return?

A. Receipt for it acknowledging that we had accomplished redemption on the property.

Q. And you were going to have that signed by him alone, is that it?

A. Yes.

Q. Did you have such a paper prepared?

A. No.

Q. You didn't have a deed prepared then?

A. No.

Q. You were going to write out a receipt that moment?

A. We expected he would write out a receipt and give it to us for the money.

99 Q. You were going to take his receipt. And what did you have in mind how the receipt would be worded?

A. Merely acknowledging the money tendered to accomplish redemption of the property.

Q. What, then, if you would have given him the check, what did you have in mind to do with his co-owner when you met up with him that day, if you met up with him? What purpose did you have in mind there?

A. When we first got into this problem of attempting to redeem the property or become interested in redeeming it, we sent a letter——

Q. That isn't what I asked you. What did you have in mind to do that day if you had given him the check, what would you do with Mr. Jacob?

A. We would have informed Mr. Jacob of our delivering the money to Mr. Brosnan. We had made several attempts to reach Mr. Jacob that day——

Q. Just a moment. I am still asking you, you have already, according to you, stated you would have given the check for the whole amount to one of the tenants in common?

A. That's right.

Q. All you were going to do, then, is tell the other tenant in common that you had given the check to his co-owner?

A. Right.

Q. So you didn't have in mind that day to give Mr. Jacob that check after you were in Brosnan's office?

A. We had intentions of delivering it to whichever one we could contact.

Q. Whichever one you met up with first?

A. That's right. We tried to reach them both.

100 Q. And then you figured your duty was done, is that it?

A. After we had contacted Mr. Brosnan, he referred us to William Jacob, indicating that William Jacob represented both of them on the matter.

THE COURT: All right. Anything further?

MR. COE: No, sir.

THE COURT: All right, step down.

CROSS-EXAMINATION.

BY MR. JACOB:

Q. Mr. Blair, when you came to see me, I specifically informed you, did I not, that I did not represent them and had no authority whatsoever to accept or refuse any check in the nature of a tender. Isn't that right?

A. That is several questions in one. You did not indicate that you didn't represent them. In fact, you indicated you did represent them——

Q. You mean for tender purposes?

A. You indicated you were not authorized to accept the tender.

Q. That's right.

A. And you would not recommend to them that they would accept it.

Q. That's right. In the amount that you mentioned.

A. In the amount offered.

MR. JACOB: That's right. That is all.

THE COURT: All right.

MR. JACOB: That is all I have.

MR. COE: We have nothing further to offer, Your Honor.

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Offer in Evidence

MR. JACOB: Your Honor, by agreement of counsel I am going to offer in evidence Defendants' Exhibit No. 2, which is the original assignment of the mortgage and bond and the judgment.

THE COURT: All right. Does that complete the testimony, gentlemen, the evidence?

MR. JACOB: Yes, Your Honor.

MR. COE: Yes.

THE COURT: I understand now, gentlemen, in the complaint the allegations which you don't deny, you admit, Mr. Jacob, on behalf of your two clients, and that those matters are in evidence?

MR. JACOB: That's right.

THE COURT: You didn't put them in?

MR. COE: Most of them are.

THE COURT: The allegations of the complaint that are undenied, you didn't put them in. I assume they are now in evidence. Any question about any of them?

MR. JACOB: No.

THE COURT: All right, they are in evidence.

How soon do you want to file your briefs? I think you better exchange briefs, then you better have a time for reply briefs. I don't see that this is a very easy question, I am sorry to say.

If that is a judicial sale and the Federal courts have said so, I don't think it is much of a problem. If they say flatly it isn't, I am not sure. I think I understand the procedure, having foreclosed myself a great many
102 mortgages. I understand in a vague way how they do it, and I would be surprised if any court would hold that isn't regular. Maybe it isn't. On the other hand, that tender, Mr. Coe, I am very doubtful about that kind of a tender, the last day.

MR. COE: Is it the day or the method in which it was done?

THE COURT: Both. I think when they say—after all, the Government has to recognize the title there. There are two people.

MR. COE: Well, that is true.

THE COURT: And if they want to wait until the last day, they are stuck with what happens the last day.

MR. COE: Well, we will argue it is substantial tender having gone to one——

THE COURT: For all they knew, Jacob had sold his property the day before. They never contacted him. One fellow can sell an undivided interest any time. I think they were bound to make a tender to both of them. On the other hand, it would seem to me under the law they are separate interests, indivisible interests, each one as a property right. It may be that it is good against one and not the other. Those are the things I want you to brief the Court, if you will.

MR. JACOB: When would you have your brief, Mr. Coe?

MR. COE: Well, let's see——

THE COURT: I think maybe I am going to hear you again orally on this matter. Agree among yourselves, if
103 you will, change your briefs and so on, and we will put the case down for argument during the next argument list, which is March 3. If that is time enough, I will hear you on the afternoon of the 6th of March, Thursday afternoon, two o'clock.

MR. COE: By the first of March?

MR. JACOB: March 6th, he said.

THE COURT: March 6 I would hear you.

MR. COE: Do you want reply briefs or exchange briefs?

THE COURT: Well, it may be if you exchange briefs and we have an argument, maybe you will want to add something after that. So on reconsideration, exchange your briefs in time for March 6.

MR. COE: By the 6th of March.

THE COURT: A couple of days ahead of time at least. I will set it down, enter an order setting this matter for argument on March 6, at two o'clock.

All right, gentlemen.

(Whereupon the proceedings were concluded.)

* * * * * * * * * * *

Reporter's Certificate to foregoing transcript omitted in printing.

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104 **Defendant's Exhibit 3**

II.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

Fi. Fa. No. 521 July Term, 1955

Sur D. S. B. No. 3089 July Term, 1955

Martha M. Berg

v.

George H. A. Parkman and Gladys Marie Short Parkman, his wife

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PETITION TO JOIN UNITED STATES OF AMERICA AS ADDITIONAL PARTY

To the Honorable, the Judges of Said Court:

The Petition of Martha M. Berg, Plaintiff above named, by her attorneys, J. Wray Connolly and Moorhead & Knox, respectfully represents:

1. Martha M. Berg, Plaintiff above named, and J. D. Berg, her husband now deceased, conveyed to George H. A. Parkman, Jr., and Gladys Marie Short Parkman, his wife, Defendants above named, by deed dated January 28, 1948, and recorded in the Office of the Recorder of Deeds of Allegheny County, Pennsylvania, in Deed Book Vol. 2988, page 345, a certain tract of land in Moon Township, Allegheny County, Pennsylvania, consisting of 175 acres, more or less, a description whereof is attached hereto, made a part hereof and marked Exhibit "A".

2. As part of the consideration for this conveyance the above named George H. A. Parkman, Jr., and Gladys Marie Short Parkman made, executed and delivered a purchase money mortgage and accompanying bond to Martha M. Berg and J. D. Berg, her husband now deceased, in the amount of $45,000, which said mortgage is dated January 28, 1948, and is recorded in the Office of the Recorder of Deeds of Allegheny County in Mortgage Book Vol. 2924, page 48.

3. The Defendants having defaulted in payments of principal and interest due pursuant to the terms of said mortgage, Martha M. Berg, Plaintiff above named, caused to be entered on June 7, 1955, judgment pro confesso at D. S. B. No. 3089 July Term, 1955, against the defendants in the penal sum of $90,000, conditioned upon the payment of $43,134.00.

4. On June 7, 1955, Martha M. Berg, Plaintiff, by *praecipe*, caused the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, to issue a writ of fi. fa. authorizing and directing the sale of the real estate described in Exhibit "A" attached hereto, by the Sheriff of Allegheny County.

5. The proposed sale by the Sheriff of Allegheny County, Pennsylvania, on July 5, 1955, was duly advertised in the Pittsburgh Post-Gazette on June 11, 1955, June 18, 1955, and June 25, 1955, and in Pittsburgh Legal Journal on June 10, 1955, June 17, 1955 and June 24, 1955.

6. On motion of Plaintiff your Honorable Court entered an order postponing said Sheriff's Sale from July
106 5, 1955, to September 12, 1955, without necessity for issuance of an alias writ of fi. fa. and without further advertising, and subsequently, on motion of Plaintiff, your Honorable Court entered an order postponing said Sheriff's Sale from September 12, 1955, to December 5, 1955, without necessity for issuance of an alias writ of fi. fa. and without further advertising.

7. Since January 28, 1948, the date when the mortgage of Plaintiff became effective, Defendants have caused the real estate herein described to be conveyed to Mountaineer Engineering Company, a corporation, and re-conveyed to Defendants on at least two occasions.

8. The United States of America has entered tax liens of record against Mountaineer Engineering Company and against George H. A. Parkman, Jr., and Gladys Marie Short Parkman, which tax liens are junior to Plaintiff's mortgage and judgment entered thereon but which liens would not be divested by a Sheriff Sale of the real estate by reason of the provisions of the Act of Congress so providing and described in the next succeeding paragraph.

9. The Act of June 25, 1948, c. 646, § 1, 62 Stat. 972, as amended May 24, 1949, c. 139, § 119, 63 Stat. 105; 28 USCA § 2410, provides, *inter alia*, that the United States of America may be named a party to the sale of real estate by a state court in order to divest the tax liens of United States of America.

10. The tax liens of the United States of America against Mountaineer Engineering Company which may be liens on the subject property, are as follows:

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Number:	*Date filed:*	*Nature of Lien:*	*Amount:*
7333	April 11, 1949	Emp. Tax and F.I.C.	$ 2,395.24
7337	April 14, 1949	Emp. Tax	1,402.29
7371	April 25, 1949	Withholding Tax	13,508.95
7908	Aug. 29, 1949	Withholding Tax and Emp. Tax F.I.C.	6,806.63
8056	Sept. 26, 1949	Withholding Tax	8,745.89
8075	Oct. 4, 1949	Emp. Tax	3,230.63
10311	Oct. 4, 1951	Withholding Tax and F.I.C.	4,540.53
10441	Nov. 28, 1951	Emp. Tax-F.U.T.	6,125.42
20019 (12012)	Oct. 16, 1953	Emp. Tax	1,197.98
22069 (13171)	Apr. 23, 1955	Emp. Tax-F.U.T.	1,336.70

11. The tax lien of the United States of America against George H. A. Parkman, Jr., and Gladys Marie Short Parkman, identified in said tax lien as George Parkman, Jr., and Marie Parkman, which may be a lien on the subject property is as follows:

Number:	*Date filed:*	*Nature of Lien:*	*Amount:*
22088 (13194)	May 3, 1955	Additional Income Tax	$ 471.39
Additional lien (13623)	Oct. 13, 1955	1948, 49.50 Addn. Inc. tax	$9,767.68

WHEREFORE, your Petitioner prays that an order be entered joining the United States of America as a party to the above entitled action so that the several tax liens of United States of America and any other liens of United States of America which may be liens against said
108 property and which are junior to Plaintiff's mortgage may be divested by the proposed Sheriff's Sale.

(s) J. WRAY CONNOLLY
(s) WILLIAM Q. SWANSON, JR.
(s) MOORHEAD & KNOX
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY, SS:

Before me, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared J. WRAY CONNOLLY, Esquire, of Moorhead & Knox, Attorneys for Petitioner, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Petition are true and correct, to the best of his knowledge, information and belief.

(s) J. WRAY CONNOLLY

Subscribed and sworn to before me this 21st day of September, 1955.

(s) J. M. McLEAN
Notary Public

ORDER OF COURT

And now, to-wit, this 22nd day of September, 1955, upon consideration of the attached Petition and on motion of J. Wray Connolly and Moorhead & Knox, Attorneys for Martha M. Berg, Plaintiff, a rule is granted on the United States of America, George H. A. Parkman, Jr., and Gladys Marie Short Parkman to show cause why the United States of America should not be made a party to this pro-
109 ceeding, pursuant to the provisions of the Act of Congress, 68 Stat. 105, 28 USCA § 2410, said rule returnable 60 days after service on United States of America, said service to be had by serving the United States Attorney for the Western District of Pennsylvania, or his authorized assistant, personally, the Attorney General of the United States, at Washington, District of Columbia, by registered mail as provided by the above Act of Congress, and George H. A. Parkman and Gladys Marie Short Parkman.

(s) BY THE COURT
AXA

[Exhibit "A" Omitted]

110 III.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Fi. Fa. No. 521 July Term, 1955
Sur D. S. B. No. 3089 July Term, 1955

Martha M. Berg

v.

George H. A. Parkman and Gladys Marie Short Parkman, his wife

ORDER OF COURT

Now, to-wit, December 20, 1955, it appearing to the Court that service of Petition and Rule to join the United States of America as an additional party defendant in the above case was made on the United States of America by personal service on the Assistant to the United States Attorney for the Western District of Pennsylvania, and by registered mail upon the Attorney General of the United States at Washington, D. C., and by registered mail upon George H. A. Parkman and Gladys Marie Short Parkman, and, it further appearing that more than sixty days have elapsed from the date of the last of such services and that no answer has been filed by any of said parties—on
111 motion of Moorhead & Knox, Attorneys for Plaintiff, said rule is hereby made absolute and the United States of America is hereby joined as a party defendant in the above entitled case in accordance with and pursuant to the Act of Congress, 68 Stat. 105, 28 United States Code Annotated, Section 2410 *et seq.*, to the end that taxes due the United States of America enumerated in said Petition and the tax lien in favor of the United States of America subsequently filed on October 13, 1955, in the Prothonotary's Office of Allegheny County, Pa., at No. 13623, being additional income tax for the years 1948, 1949 and 1950

in the amount of $9767.68 against the said George Parkman, Jr., and Marie Parkman shall be divested by the sale of the real estate described in said petition being made by the Sheriff of Allegheny County, Pennsylvania, on January 3, 1956, after which sale the said real estate so sold shall be free and clear of all liens.

[JUDGE WEISS]

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113 IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1958

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*.

Opinion of the Court

Filed March 26, 1959

By MCLAUGHLIN, *Circuit Judge*.

On January 28, 1948, Martha M. Berg and her husband, J. D. Berg, conveyed to George H. and Gladys M. Parkman 175 acres in Moon Township, Pennsylvania. The Parkmans gave back a purchase money mortgage in the sum of $45,000 which was duly recorded and a mortgage bond in

the sum of $90,000. Thereafter the property was
114 conveyed a number of times back and forth between the Parkmans and Mountain Engineering Company, a corporation controlled by the Parkmans; these conveyances were all subject to the purchase money mortgage.

During a period when the corporation owned the property certain federal tax liens attached to it and were recorded. Thereafter an additional federal tax lien arising from a tax liability of the Parkmans attached to the property and was recorded at a time when the Parkmans held the property. The tax liens were all junior to the mortgage.

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955 caused a confession of judgment to be entered on the bond. The judgment was for $43,135 plus interest from June 1, 1955. Subsequently a writ of *fieri facias* for the sale of the property issued to the sheriff; upon application, however, the sale was postponed and the surviving mortgagee petitioned the Pennsylvania Court of Common Pleas for a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings. The rule was granted and served upon the United States. No answer was filed, so eighty-nine days after service the United States was made a party to the proceedings. During the intervening time Wililam J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest.

The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. The amount of the bid went to satisfy costs of the sale, and for various outstanding local taxes.

On January 3, 1957, one year after the sale the government attempted to redeem the property [1] through the tender by an agent to Brosnan of a check for $6,575.42, which represented the amount bid at the sheriff's sale, plus interest. Brosnan refused it as totally inadequate to effect
a redemption. Brosnan and Jacob have since claimed
115 that an effective redemption would have required a tender of $55,591.28, the amount of their asserted interest in the property.

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[1] 28 U.S.C. 2410(c) (1952).

The United States subsequently brought this action under § 7403, Internal Revenue Code of 1954,[2] to enforce its lien. The district court thus was presented with the question of whether the government lien was still enforcible.

The court held, 164 F.Supp. 357 (W.D.Pa. 1958), that the United States had not been made a party to the foreclosure proceedings in the state court by the attempted invocation in that proceeding of 28 U.S.C. § 2410 (1952) because no attempt was made to bring in the United States until after judgment had been entered on the confession of judgment. But the court went on to hold that the lien had nonetheless been divested simply by reason of its being a junior lien.

The government argues that § 7403, Internal Revenue Code 1954, footnote 2 supra, directs and requires that a decree for sale of the property in question be entered here. It is plain, however, that a sale may be decreed only "* * * where a claim or interest of the United States * * * is established." Thus the issue presented is whether after the sale on execution following the confession of judgment the United States still held any interest in the property.

For its claim that it continued to hold an interest in the property, the government's basic premise is that once a lien has been established by federal law it remains
116 until it is satisfied or becomes unenforcible by lapse of time.[3] The government asserts that the lien can be satisfied other than by payment only by compliance with

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[2] That section reads in pertinent part:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof * * * the Attorney General * * * may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States * * *."

"(c) *Adjudication and decree.*—The court shall * * * proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

[3] § 6322, Internal Revenue Code, 1954; § 3671, Internal Revnue Code, 1939.

one of a number of other federal statutes.[4] It is urged that when these statutes are taken together a plain intent on the part of the Congress to furnish exclusive means for removal of federal liens is made out. Since assertedly none of these provisions has previously been complied with, the government concludes that the lien remains for enforcement in this proceeding.

The claim advanced by the government that state law in no way controls federal tax liens which have attached to property is too broad;[5] the cases cited for this proposition stand more narrowly for the tenet that the priority of a lien of the United States for unpaid taxes relative to other liens always involves a federal question.[6] In this case there is no question of priority, it being conceded that the liens of the United States were junior.

For its conclusion that the federal statutes make out a scheme by which Congress intended to furnish the only means for extinguishing even junior liens held by the United States, the government has relied heavily on the legislative history of what is now 28 U.S.C. § 2410 (1952).[7] The House Report[8] states that without the legislation involved there is no way in which a cloud upon title caused by a junior lien held by the United States can be removed when a prior mortgage is being foreclosed, since there is no statute to authorize making the United States a party to such a proceeding. The government would conclude
117 from this that a junior lien in favor of the United States remains unaffected when foreclosure of the senior lien is had without making the United States party thereto.

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[4] §§ 6325, 7403, 7424, Internal Revenue Code, 1954; 28 U.S.C. § 2410 (1952).

[5] Reliance in this case on United States v. Kensington Shipyard & Drydock Corp., 169 F.2d 9 (3 Cir. 1948) is misplaced, since the lien held by the United States there was superior to all others.

[6] E.g., United States v. New Britain, 347 U.S. 81 (1954); United States v. Texas, 314 U.S. 480 (1941); Ersa, Inc. v. Dudley, 234 F.2d 178 (3 Cir. 1956).

[7] 46 Stat. 1528 (1931).

[8] H.Rep. , 71st Cong. 2d Sess.

But this court has already held that the purpose of § 2410 was to permit the joining of the United States in foreclosure proceedings on a more senior lien in jurisdictions where joinder would be necessary for estopping the junior lienor from thereafter asserting his claim. United States v. Cless, 254 F.2d 590 (3 Cir. 1958). The Cless case decided that where, as in Pennsylvania, such joinder was not necessary to divest a junior lien, the United States did not have to be joined in order to divest its junior lien. We conclude that the government's position is not convincing and that Congress never intended government-held junior liens not to be subject to divestment by foreclosure proceedings carried out in the state courts without joinder of the United States.[9] Thus state law must be looked to in order to determine those rights and incidents arising from the federally created lien which are not prescribed by federal law. See United States v. Bess, 357 U.S. 51, 55 (1958).

In United States v. Boyd, 246 F.2d 477, 483 (5 Cir. 1957), cert. den. 355 U.S. 899, a case closely similar to this one, the court perceptively pointed out that it is the consequence of the "* * * prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination * * * that this has been the effect of enforcement of the senior lien."

Pennsylvania law requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property
118 under the writ of *fieri facias* which was issued in this matter. Pa. Stat. Ann. tit. 21, § 804; tit. 12, §§ 2441-2444. Whether this form of notice might raise constitutional questions of due process under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), when the identity of persons holding a junior interest in the property is or should be known to the senior mortgagee is of no concern in the present situation; it is clear that notice of this foreclosure was given to the United States.

[9] We cannot agree with the decision of the Ninth Circuit (which is based on an assumption to the contrary) in United States v. Bank of America National Trust & Savings Association, — F.2d —, opinion filed February 2, 1959.

The buyer at the Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, § 2447. When the execution is on a judgment for a mortgage debt, the execution relates back to the time of giving the mortgage. West Arch Building & Loan Assn. v. Nichols, 303 Pa. 434 (1931); Moore v. Schell, 99 Pa. Super. 81 (1930). The United States consequently retains no interest in the property.

The government suggests that Metropolitan Life Insurance Co. v. United States, 107 F.2d 311 (6 Cir. 1939), rather than the Boyd opinion, expresses the law for this case. But in that decision the court conceived of the proceeding as one for the divestiture of an existing lien, rather than as one to determine the more basic question of the very existence of the lien.[10]

A question remains as to whether the United States had any right to redeem the property under 28 U.S.C. § 2410(c) (1952), and if it did, whether the right was effectively exercised by the tender of only $6,575.42. Without dealing with the effect of the government's present argument regarding inapplicability of the section to this
119 case and so passing the question of whether a right of redemption is conferred only when foreclosure occurs under § 2410, it is plain in any event that the tender was insufficient in amount. One who seeks to redeem is proceeding on the hypothesis that the mortgage has never been foreclosed as to him. He can lift the mortgage only by paying it in full. Collins v. Riggs, 81 U.S. (14 Wall.) 491 (1872). It is undisputed that the unsatisfied mortgage debt for which the property was sold amounted to $43,135 plus interest.

Since the United States has demonstrated no right to the property, the judgment will be affirmed.

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[10] For adverse comment on Metropolitan Life Insurance Co. v. United States, supra, see Notes, 53 Harv. L.R. 894 and 49 Yale L.J. 1106. At pp. 1108 and 1109 of the latter it is said: "In arriving at its result, the majority failed to distinguish between releasing a specific lien and adjudicating a specific lien to be non-existent. Under this view, an income tax lien once it has properly attached, assumes some absolute status, destructible only upon submission of the premises to resale, in accordance with the provisions of the statute. Destructibility of the tax debtor's interest, by reason of limitation on its extent, and consequent failure of the lien for want of a res are ignored as possibilities."

121 IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12711

UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*

Judgment—March 26, 1959

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

• • • • • • • • • •

March 26, 1959

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(File endorsement omitted)

123 UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Western District of Pennsylvania—Greeting:

Mandate

WHEREAS, lately in the United States District Court for the Western District of Pennsylvania, before you or some of you, in a cause between United States of America, Plaintiff and William J. Brosnan, Francis H. Jacob, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company, Defendants (District Court No. 15973 Civil Action) a judgment was entered on April 29, 1958 and entered on the judgment docket May 1, 1958 in favor of Defendants and against Plaintiff, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed. March 26, 1959

* * * * * * * * * * *

(File endorsement omitted)

124 YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according

to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 14th day of April in the year of our Lord one thousand nine hundred and fifty-nine.

IDA O. CRESKOFF
Clerk, United States Court of Appeals for the Third Circuit

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125 Clerk's Certificate to foregoing transcript omitted in printing.

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127 SUPREME COURT OF THE UNITED STATES

No. 137, October Term, 1959

UNITED STATES OF AMERICA, PETITIONER,

vs.

WILLIAM J. BROSNAN ET AL.

Order Allowing Certiorari. October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and one and one half hours are allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,
PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

No. 16034

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Exhibit "B"—(Continued)

Beginning at the most northerly corner of the within described parcel whence the ¼ Section corner between Sections 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 16° 35′ E. 206.25 feet and N. 25° 32′ W. 358.80 feet distant, and running thence 1st. S. 16° 35′ W. 86.57 feet; thence 2nd. S. 82° 00′ E. 158.55 feet; thence 3rd N. 5° 39′ E. 85.60 feet and thence 4th. N. 82° 00′ W. 142.11 feet to the place of beginning.

Together With an easement 20 feet in width for roadway purposes, described as follows:

Beginning At the most southerly corner of that certain parcel of land situate in the County of Calaveras, State of California, and described in the Deed dated January 6th, 1950 by Richard G. Churchill et al. to Guerdon L. Churchill et ux. and recorded January 11th, 1950 in Book 59 of Official Records at page 59, Calaveras County Records, and running thence 1st. South 82° 00′ East a distance of 20.02 feet; 2nd. North 5° 39′ East a distance of 201.99 feet to the County Road known as the Old State Highway; 3rd. North 61° 05′ West a distance of 21.77 feet along said road; and 4th. South 5° 39′ West a distance of 209.77 feet to the point of beginning.

EXHIBIT "C"

Located in File Building

1 Stanley Bench Grinder with ½ HP Stanley Motor #G67414A

1 Acme Saw Gummer with ¾ HP Westinghouse Motor #1180279ALO

NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,
Assistant United States Attorney General,

LEE A. JACKSON,
Attorney,
Dept. of Justice,
Washington 25, D. C.,

LLOYD H. BURKE,
United States Attorney,

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Assistants United States Attorney,
Post Office Building,
San Francisco, Calif.,

For Appellant.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,

300 Montgomery Street,
San Francisco 4, Calif.,

For Appellee.

Exhibit "C"—(Continued)

1 Oxygen Acetylene Presto Weld Welding Outfit with gauges, hose, torch tips & cart

1 Shober Dial Amp Electric Welder Model K-200

Extra Motors

1 ½ HP U.S. Motor, Serial #654011, 1—1 HP U.S. Motor, Serial #652807

1 5 HP U.S. Motor, Serial #745374

1 3 HP Crocker Wheeler Motor, Serial #116931

1 1 HP B-Line Motor, Serial #2216380

1 2 HP G.E. Motor on Falk Motor Reducer #LJ6327, 1—10 H.P. U.S. Motor, Serial #491982

Located in Mill Building

Main Control Electrical Panel:

Disconnect Switches	100A	60A	30A	Misc.
Main				600A
Blower	1			
14			14	
9		9		
1				200V
1 Multi-Breaker				110-220V
Line Starters Magnetic				
Blower	1			
9			9	
7		7		

1—15 KVA Transformer

Value (Main Control Electrical Panel)

1 Goff Moulder 2x4 with following motors & Switches:

1 1 HP U.S. Motor, Serial #73986

1 7½ HP U.S. Motor, Serial #602001

In the United States District Court, Northern District of California, Southern Division

No. 36485

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

PETITION FOR REMOVAL

The defendant, United States of America, by the undersigned, its attorneys, states that:

1. This petition is brought pursuant to Section 1444 of Title 28, U. S. C., which provides:

Any action brought under Section 2410 of this title against the United States in any State court may be removed by the United States to the District Court of the United States for the district and division in which the action is pending.

2. An action to quiet title to real property was filed in the Superior Court of the State of California, in and for the County of Calaveras bearing the above caption.

3. The United States of America has been named a party defendant pursuant to the provisions of Section 2410 of Title 28 U.S.C., on the ground that it claims a lien upon the real property.

4. A copy of the Summons and Complaint was received by the United States Attorney on May 16, 1957, and copies thereof are attached hereto.

Wherefore, the defendant, United States of America, prays that this action be removed to this court.

LLOYD H. BURKE,
United States Attorney,
/s/ By LYNN J. GILLARD,
Assistant U. S. Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Duly Verified.

Affidavit of Mailing Attached.

In the Superior Court of the State of California
in and for the County of Calaveras

No. 4775

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT TO QUIET TITLE

Plaintiff Complains of Defendant and For a First Cause of Action Alleges:

I.

Bank of America National Trust and Savings Association, Plaintiff herein, is a national banking association, organized and existing under and by virtue of the laws of the United States of America, having its principal place of business at 300 Montgomery Street, in the City and County of San Francisco, State of California.

II.

Plaintiff is the owner in fee simple of that certain piece or parcel of land situate, lying and being in the County of Calaveras, State of California, bounded and particularly described in Exhibit A.

III.

Plaintiff is the owner in fee simple of that certain piece or parcel of land situate, lying and being in the County of Calaveras, State of California, bounded and particularly described in Exhibit B.

IV.

The Defendant above named claims and asserts an interest in and to said parcels of land adverse to Plaintiff, to wit:

"13th. Notice of Federal Tax Lien, dated February 10th, 1954, and filed February 19th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corporation, for $5,309.77, plus statutory interest from date of notice of demand to date of payment, Serial No. 846-1954.

14th. Notice of Federal Tax Lien, dated March 25th, 1954, and filed April 5th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corp., for $6,207.58, plus statutory interest from date of notice and demand to date of payment, Serial No. 1971-1954."

Said claims of Defendant are without any right whatever and Defendant has no estate, lien, right, title or interest whatever in said land or premises or any part thereof.

Plaintiff Complains of Defendant and For a Second Cause of Action Alleges:

I.

Plaintiff refers to Paragraph I of its first cause of action and incorporates the same herein as if set forth in full. Plaintiff is now and for some time hitherto has been the owner of the personal property particularly described in Exhibit C.

II.

The Defendant above named claims and asserts an interest in and to the above described personal property adverse to Plaintiff, to wit:

"13th. Notice of Federal Tax Lien, dated February 10th, 1954, and filed February 19th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corporation, for

$5,309.77, plus statutory interest from date of notice of demand to date of payment, Serial No. 846-1954.

14th. Notice of Federal Tax Lien, dated March 25th, 1954, and filed April 5th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corp., for $6,207.58, plus statutory interest from date of notice and demand to date of payment, Serial No. 1971-1954."

Plaintiff alleges that said claim and each of them are without any right whatever. Defendant has no estate, lien, right, title or interest in said personal property or in any part thereof.

Wherefore, Plaintiff prays: (1) That Defendant be required to set forth the nature of its several claims and that all adverse claims of Defendant, and each of them be determined by a decree of this court; (2) That by said decree it be declared and adjudged:

(a) That Plaintiff is the owner of the parcels of land described in Exhibit A and B, and that Defendant has no estate, lien, right, title or interest whatever in or to said land, and also that Defendant be forever barred and enjoined from asserting any claim whatever in or to said land or premises adverse to Plaintiff;

(b) That Plaintiff is the owner of the personal property described in Exhibit C, and that Defend-

ant has no estate, lien, right, title or interest whatever in said personal property, and also that Defendant be forever barred from asserting any claim whatever in or to said personal property adverse to Plaintiff;

(3) For costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,
/s/ By ELDON C. PARR,
Attorneys for Plaintiff.

Duly Verified

[Endorsed]: Filed May 3, 1957.

[Title of Superior Court and Cause.]

SUMMONS

The People of the State of California Send Greeting to: United States of America, Defendants.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above brought against you in the Superior Court of the State of California, in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said

Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the County of Calaveras, State of California.

Dated: May 3, 1957.

[Seal] JOHN SQUELLATI,
Clerk,
By EMMA THOMPSON,
Deputy Clerk.

EXHIBIT "A"

Parcel One:

A fractional portion of the NW1/4 of SW1/4 of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the most northerly corner of the within described parcel and on the fence line as it existed September, 1947 on the Southerly side of the County Highway, whence the 1/4 Sec. corner between Secs. 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 25° 32' W., 358.8 feet distant, and running thence 1st. S. 16° 35' W., 358.5 feet along a fence; thence 2nd. S. 14° 39' W. 156.8 feet to a concrete marker on the northerly right of way boundary of the State Highway between Valley Springs and San Andreas, which marker is opposite and 40 feet from Engineers' center line Station 232 plus 00

Exhibit "A"—(Continued)

of plans adopted by The California Highway Commission on July 9, 1937; thence 3rd. N. 87° 40' E., 1191.4 feet along said State right of way boundary; thence 4th. N. 11° 21' W., 12.5 feet to the southerly side of said County Highway; thence, and following along the fence on the southerly side of said County Highway for the following seven courses, 5th. N. 75° 35' W. 39.9 feet, thence 6th. N. 77° 54' W. 318 feet; thence 7th. N. 75° 44' W. 30.9 feet; thence 8th. N. 67° 27' W. 60.5 feet; thence 9th. N. 67° 03' W. 59.8 feet; thence 10th. N. 63° 38' W., 50.4 feet; thence 11th. N. 61° 05' W. 581.0 feet to the place of beginning, and containing 5.854 acres, more or less.

EXHIBIT "B"

Parcel Two:

A fractional portion of NE¼ of SE¼ of Sec. 9, and a fractional portion of NW¼ of SW¼ of Sec. 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the NE corner of the within described parcel, whence the ¼ sec. corner between Secs. 9 and 10, T. 4 N., R. 11 E., M. D. B. & M., bears N. 4° 20' W. 668.7 feet distant, and running thence 1st. S. 87° 40' W. 795.8 feet, parallel to the State Highway between Valley Springs and San Andreas and 150 feet northerly from the northerly right of way boundary thereof; thence 2nd. S. 2° 20' E. 150 feet to a point on the said northerly right of way boundary of the State Highway;

Exhibit "B"—(Continued)

thence 3rd. N. 87° 40′ E. 750 feet along said last mentioned highway boundary to a concrete marker thereon, which marker is opposite and 40 feet from Engineers' center line station 232 plus 00 of plans adopted by the California Highway Commission on July 9, 1937; thence 4th. N. 14° 39′ E., 156.8 feet to the place of beginning, and containing 2.662 acres, more or less.

Saving, Excepting and Reserving, however, all of the minerals and mineral rights below 50 feet from the surface of the above described Parcels One and Two of said real property above described together with the right to enter therein and extract and remove the same from and through the adjoining premises of said grantors and not from or through the surface of the above described two parcels of real property and also reserving the further right to obtain water from any water well constructed in and upon the above described two parcels of real property by said grantees in the event that said grantees construct or develop any water well upon the above described two parcels of real property that shall materially affect the flow of water in any of the existing wells had and maintained by grantors upon their adjoining premises, it being expressly understood and agreed that the grantees herein are herein and hereby expressly given the right to sink or construct a well in and upon said two parcels of real property hereby conveyed and into the real property below 50 feet from the surface thereof to any depth that may be neces-

Exhibit "B"—(Continued)

sary for said grantees to go in order to obtain a supply of water for use upon said two parcels of real property hereby conveyed, as said minerals and mineral rights and right to water were excepted and reserved in the Deed dated March 25th, 1949 by Mary Alma Gann et al., as Grantors, to R. G. Churchill and G. L. Churchill, as Grantees, and recorded May 26th, 1949 in Book 56 of Official Records at page 63 et seq., Calaveras County Records, and in the Deed dated April 20th, 1949 by Emily N. Swinborne, as Guardian of the Persons and Estates of Marilyn Ann Haupt et al., minors, as Grantor, to R. G. Churchill and G. L. Churchill, as Grantees, and recorded May 26th, 1949 in Book 56 of Official Records, at page 65 et seq., Calaveras County Records.

And Further Excepting from the lands and premises hereinabove described the parcel hereinafter described, and subject to the Easement 20 feet in width for roadway purposes hereinafter described, viz:

All that real property situated in the County of Calaveras, State of California, and particularly bounded and described as follows:

Being a fractional portion of NW¼ of SW¼ of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the most northerly corner of the within described parcel whence the ¼ Section corner between Sections 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 16° 35' E. 292.82 feet and

Exhibit "B"—(Continued)

N. 25° 32′ W. 358.8 feet distant, and running thence 1st, S. 16° 35′ W. 65.68 feet; thence 2nd. S. 82° 00′ E. 171.0 feet; thence 3rd. N. 5° 39′ E. 65.0 feet; and thence 4th. N. 82° 00′ W. 158.55 feet to the place of beginning.

Together With an easement 20 feet in width for Roadway purposes described as follows:

Beginning at the most easterly corner of that certain parcel of land situate in the County of Calaveras, State of California, and described in the Deed dated January 6th, 1950 by Richard G. Churchill, et al., to Richard G. Churchill et ux., and recorded January 11th, 1950 in Book 59 of Official Records, at page 58, Calaveras County Records, and running thence 1st. South 5° 39′ West a distance of 20 feet; 2nd. South 82° 00′ East a distance of 20.02 feet; 3rd. North 5° 39′ East a distance of 221.99 feet to the County Road known as the Old State Highway; 4th. North 61° 05′ West a distance of 21.77 feet; thence 5th. South 5° 39′ West a distance of 209.77 feet to the place of beginning.

And Further Excepting from the lands and premises hereinabove described the parcel hereinafter described and subject to the easement 20 feet in width for roadway purposes hereinafter described, viz:

All that real property situated in the County of Calaveras, State of California, and particularly described as follows:

Being a fractional portion of NW¼ of SW¼ of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Exhibit "C"—(Continued)

1 3 HP U. S. Motor, Serial #716205, 3—30 Amp Magnetic Switches

1 Atlas 10" Bench Saw #003982 with 1 HP Atlas Motor #6613KAP6783

1 Goff Moulder 2x4 with following motors and switches:

1 1½ HP U.S. Motor, Serial #712060, 1—5 HP U.S. Motor, Serial #571971

1 5 HP U.S. Motor, Serial #745372, 3—30 Amp Magnetic Switches

1 Heston-Anderson Swing Cut Off Saw #55 with 1—3 HP B-Line Motor #2114177

1 Eby Swing Cutoff Saw with 1—3 HP G.E. Motor, #XC29399

1 Irvington Swing Cut Off Saw with 1—1 HP G.E. Motor #RX18771

1 Shop Built Gang Rip Saw with 1—5 HP U.S. Motor, #434680 and 1—2 HP A.C. Motor on Falk Speed Reducer #2251 DUC

1 Hayward-Hallett Air Compressor #1693 NB with 1—7½ HP Westinghouse Motor #881-EM4522

Located in Storage Shed

1 XL Moulder 2x4, no motors, not in use

1 Crescent Pony Planer, Ser. #79900 with 1—1 HP Westinghouse Motor #7408 and 1—7½ HP Woods Motor #59591—Direct Drive

1 Shop built equalizer with 1—10 HP Westinghouse Motor #9EM2228 and 1—¾ HP Master Gear Motor #ZH4436, 1 Magnetic Switch

Exhibit "C"—(Continued)

1 Irvington Swing Cut Off with 1—1 HP Westinghouse Motor #7410

1 California Saw Works Cleat Machine #F-10547 with 1—¾ HP Sterling Vertical Motor #B-4009-2

1 California Saw Works Cutoff Machine #F-10547 with 1—7½ HP Westinghouse Motor #6406 and 1—30 Amp Magnetic Switch

Miscellaneous

1 California Blower #1512, Blowpipe Type, with 1—30 HP Westinghouse Motor #7404

1 240′ Rex Transfer chain on 60′ wooden frame with 1—3 HP G.E. Gear Reducer Motor

1 500′ Rex Transfer Chain on wood frame with 1—3 HP G.E. Motor #J6327 with Falk Gear Reducer #180-833

1 300′ Chain on 150′ Sawdust Conveyor with 1—5 HP Westinghouse Motor with Speed Reducer #1EM-3509

1 Sears Cement Mixer ¼ sack capacity, ⅓ HP Motor

1 Sawdust Burner, sheet steel over steel frame bolted to concrete pier foundation

Turner 42″ Tandem Twin Band Resaw with Bevelling and Rounding Attachments. Machine Serial #29561, 2 HP Sterling Speed Trol; Allis-Chalmers 5 HP Bevelling Motor, Serial #225; Two Allis-Chalmers 30 HP Main Drive Motors, Serial #588-587 & #588594

#663, with Turrer Ripping Attachment, Serial

Exhibit "C"—(Continued)

Turner 42" Tandem Twin Band Resaw, Serial #A47 2 HP Sterling Speed Trol; Two Westinghouse 30 HP Main Drive Motors, Serial #4807, Style 1441939; General Electric 15 HP Profile Motor #PE2390.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES OF AMERICA

The United States of America for its answer to the Complaint, as to the First Cause of Action,

I.

Admits the allegations contained in paragraph I.

II.

Denies any information or belief as to the allegations contained in paragraph II and III.

III.

Admits the allegations contained in paragraph IV that the defendant, United States of America, claims an interest in said parcels of land adverse to the plaintiff, and alleges that with respect to the notice of Federal tax lien dated February 10, 1954, in the original amount of $5,309.77, for employment withholding taxes for the 3d quarter of 1953, which taxes were assessed on November 18, 1953, there remains due and owing $4,957.58, plus accrued interest as provided by law; that with respect to the notice of Federal tax lien dated March

25, 1954, in the amount of $6,207.58, for employment withholding taxes for the 4th quarter of 1953, which taxes were assessed on February 24, 1954, said amount remains due and owing; and the United States of America further alleges that there were assessed on March 4, 1954, Federal unemployment taxes for the 2d quarter 1954, in the amount of $328.40, against Sierra Wood Products Corporation; that said amount remains due and owing and is also a lien upon the property described in the complaint. The United States denies the allegations contained in the last three lines of paragraph IV.

The United States of America for its answer to the Second Cause of Action

I.

Admits that portion of paragraph I which incorporates paragraph I of the First Cause of Action but denies any information or belief as to whether plaintiff is, and has been, the owner of said personal property described in Exhibit C attached to the Complaint.

II.

Defendant, United States of America, in answer to paragraph II of plaintiff's Second Cause of Action, refers to paragraph III of its answer to the First Cause of Action and incorporates the same herein as if set forth in full.

Wherefore, the United States prays:

1. That this action be dismissed, or in the alternative

2. That the tax liens herein be foreclosed and the property sold and the proceeds be paid to the United States in accordance with its priority for application on the taxes as set forth herein, and

3. For such other and further relief as the Court deems just and proper.

LLOYD H. BURKE,
United States Attorney,
By CHARLES ELMER COLLETT,
Assistant U. S. Attorney,
JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Affidavit of Mailing Attached.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled action having come on for pretrial conference on Friday, September 20, 1957, the following facts were agreed to by all respective parties and such facts are no longer in issue:

1. On February 13, 1953, Sierra Title Company, a California corporation, executed and delivered its deed of trust in favor of plaintiff. A true copy of said deed of trust is attached hereto marked Exhibit A and made a part hereof. At the time said deed of trust, Exhibit A hereof, was executed,

was the owner in fee simple of the real property described therein.

2. On February 13, 1953, Sierra Title Company, a California corporation, executed and delivered its chattel mortgage to plaintiff. A true copy of said chattel mortgage is attached hereto marked Exhibit B and made a part hereof. At the time of the execution of said chattel mortgage, Exhibit B hereof, Sierra Title Company, a California corporation, was the owner of each and all of the chattels described therein.

3. On April 9, 1953, Sierra Wood Products Corporation executed and delivered its chattel mortgage to plaintiff. A true copy of said chattel mortgage is attached hereto, marked Exhibit C, and made a part hereof. At the time of the execution of said chattel mortgage, Exhibit C hereof, Sierra Wood Products Corporation, a California corporation, was the owner of each and all of the chattels described therein.

4. Said deed of trust, Exhibit A hereof, and said chattel mortgages, Exhibits B and C hereof, were promptly and duly recorded upon execution and delivery.

5. On or about September 28, 1953, Sierra Title Company, a California corporation, transferred its right, title and interest in the real property described in said deed of trust, Exhibit A hereof, and in the chattels described in said chattel mortgage, Exhibit B hereof, to Sierra Wood Products

6. There was filed on February 19, 1954, with the Office of the County Recorder of Calaveras County, California, a notice of Federal tax lien against Sierra Wood Products Corporation in the original amount of $5,309.77 for employment withholding taxes for the 3rd quarter of 1953, which taxes were assessed on November 18, 1953, and although demanded, there remains due and owing $4,957.58, plus accrued interest as provided by law.

7. There was filed on April 5, 1954, with the Office of the County Recorder of Calaveras County, California, a notice of Federal tax lien against Sierra Wood Products Corporation in the original amount of $6,207.58 for employment withholding taxes for the 4th quarter of 1953, which taxes were assessed on February 24, 1954, and although demanded, the entire balance, plus accrued interest as provided by law, remains due and owing.

8. On March 4, 1954, Federal employment taxes for the 2nd quarter of 1954 in the amount of $328.40 were duly assessed against Sierra Wood Products Corporation and although demanded, said amount, plus accrued interest as provided by law, remains due and owing.

9. Default occurred in the performance of the obligations secured by said deed of trust, Exhibit A hereof, and said chattel mortgages, Exhibits B and C hereof. Following said default and prior to March 15, 1956, all necessary and proper procedures for the foreclosure of said deed of trust,

therein contained, were duly performed. After said default and prior to March 15, 1956, all necessary and proper procedures for the foreclosure of said chattel mortgages, Exhibits B and C hereof, by a pledgee sale were duly performed.

10. Said deed of trust, Exhibit A hereof, was duly foreclosed on March 15, 1956, by sale at public auction pursuant to power of sale contained therein. Said chattel mortgages, Exhibits B and C hereof, were duly foreclosed on March 15, 1956, by sale at public auction pursuant to a pledgee's power of sale and the provisions of said chattel mortgages. The property described in said deed of trust, Exhibit A hereof, and in said chattel mortgages, Exhibits B and C hereof, was at said sale offered for sale separately and as a unit and all of said property was sold to Bank of America National Trust and Savings Association.

11. No actual notice of foreclosure sales particularly set forth above was given to the defendant, United States of America, and no request for notices of sales or default was filed for record in the Office of the County Recorder, Calaveras County, California, as provided for in the California Civil Code, Section 2924b.

It was further agreed between the respective parties to this action that the following question is in issue: Whether the foreclosure and sale pursuant to said deed of trust and the foreclosure and sale of said chattel mortgages under a pledgee's power of sale and the provisions of said chattel

mortgages, gives purchaser or purchasers at said sales a title free and clear of Federal tax liens.

Dated: November 4, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel,
Internal Revenue Office.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR.
/s/ ELDON C. PARR,
Attorney for Plaintiff.

EXHIBIT "A"

This Deed of Trust, made this 13th day of February, 1953, Between Sierra Title Company, a Corporation, as Trustor, ("Trustor" to be interpreted as "Trustors" where context requires), Corporation of America, a California corporation, as Trustee, and Bank of America National Trust and Savings Association, a national banking association, as Beneficiary,

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee, In Trust, With Power of Sale, the following described property

Exhibit "A"—(Continued)

situate in the ....., County of Calaveras, State of California, to-wit:

[Note: Description appearing here is the same as Exhibit A and B set out at pages 9-14 of this printed record.]

including all appurtenances and easements used in connection therewith, all water and water rights (whether riparian appropriative, or otherwise, and whether or not appurtenant) used in connection therewith, all shares of stock evidencing the same, pumping stations, engines, machinery, pipes and ditches, including also all gas, electric cooking, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment which have been or may hereafter be attached in any manner to any building now or hereafter on the said property, or to the said property, and also the rents, issues and profits thereof, Subject, However, to the right, power and authority hereinafter given to and conferred upon the Beneficiary to collect and apply such rents, issues and profits.

For The Purpose of Securing: (1) Payment of the sum of $9,000.00 with interest thereon according to the terms of a promissory note or notes of even date herewith, made by Trustor, payable to the order of the Beneficiary, and extensions or renewals thereof; (2) payment of such additional amounts as may be hereafter loaned by Beneficiary or its successor to the Trustor or any of them, or any successor in interest of the Trustor,

Exhibit "A"—(Continued)

with interest thereon, and any other indebtedness or obligation of the Trustor, or any of them, and any present or future demands of any kind or nature which the Beneficiary or its successor may have against the Trustor, or any of them, whether created directly, or acquired by assignment, whether absolute or contingent, whether due or not, whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter; (3) performance of each agreement of Trustor herein contained; and (4) payment of all sums to be made by Trustor pursuant to the terms hereof.

To Protect The Property and Security Granted By This Deed of Trust, Trustor Agrees:

(a) Properly to care for and keep said property and the buildings and improvements situate thereon in good condition and repair; to underpin and support, when necessary, any building or other improvement situate thereon, and otherwise to protect and preserve same; not to remove or demolish any building or improvement situate thereon; to complete or restore promptly, and in good and workmanlike manner, any building or improvement which may be constructed, damaged or destroyed thereon, and pay in full all costs incurred therefor; not to commit or permit waste of the property; to comply with all laws, covenants, conditions or restrictions affecting the property; to provide and maintain fire (and if required by Ben-

Exhibit "A"—(Continued)

eficiary, earthquake and other) insurance satisfactory to and with loss payable solely to Beneficiary, and to deliver all policies to Beneficiary, which delivery shall constitute assignment to Beneficiary of all return premiums; to appear in and defend, without cost to Beneficiary or Trustee, any action or proceeding purporting to affect the security hereunder, or the rights or powers of Beneficiary or Trustee, and, when required by Trustee or Beneficiary, to commence and maintain any action or proceeding necessary to protect such security and such rights or powers; and should Trustee or Beneficiary elect to appear in, defend, or commence and maintain any such action or proceeding, to pay all their costs and expenses, including attorney fees; to pay before delinquency, all taxes, assessments and charges affecting the property, including assessments on appurtenant water stock; to pay when due all encumbrances, charges and liens which appear to be prior or superior hereto; to pay all costs, fees and expenses of this trust; if said property be agricultural, to farm said land in an approved and husbandlike manner, and to keep all trees, vines and crops on said land properly cultivated, irrigated, fertilized, sprayed and fumigated; to replace all dead or unproductive vines or trees with new ones, and to keep all buildings, fences, ditches, canals, wells and other farming improvements on said premises in first-class condition, order and repair.

(b) Should Trustor fail to make any payment or

Exhibit "A"—(Continued)

do any act as herein provided, then Beneficiary or Trustee (but without obligation so to do, and without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereunder) may make or do the same, and may pay, purchase, contest or compromise any encumbrance, charge or lien, which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability and expend whatever amounts in its absolute discretion it may deem necessary therefor. All sums so incurred or expended by Beneficiary or Trustee shall be without demand immediately due and payable by Trustor, and shall bear interest at the rate of ten per cent per annum, and be secured hereby.

It Is Mutually Agreed That:

1. Should the property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire or earthquake, or in any other manner, Beneficiary shall be entitled, at its option, to commence, appear in and prosecute in its own name, any action or proceeding, or to make any compromise or settlement, in connection with such taking or damage, and to obtain all compensation, awards or other relief therefor. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of insurance affecting said property, are hereby assigned to Beneficiary, who may release any money so received by it, or apply

Exhibit "A"—(Continued)

the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages and rights of action and proceeds, as Beneficiary or Trustee may require. The Trustee or Beneficiary may enter upon the property at any time during the existence of this trust for the purpose of inspection, or for the accomplishment of any of the purposes hereof.

2. By accepting payment of any sum hereby secured after its due date, or after the filing of notice of default and of election to sell, Beneficiary shall not waive its right to require prompt payment when due of all other sums so secured, or to declare default for failure so to pay, or to proceed with the sale under any such notice of default and of election to sell, for any unpaid balance of said indebtedness. If Beneficiary holds any additional security for any obligation secured hereby, it may enforce the sale thereof at its option, either before, contemporaneously with, or after the sale is made hereunder, and on any default of Trustor, Beneficiary may, at its option, offset against any indebtedness owing by it to Trustor, the whole or any part of the indebtedness secured hereby.

3. Without affecting the liability of any person, including Trustor, for the payment of any indebtedness secured hereby, or the lien of this deed of trust on the remainder of the property for the full amount of any indebtedness unpaid, Beneficiary and Trustee are respectively empowered as follows:

Exhibit "A"—(Continued)

Beneficiary may from time to time and without notice (a) release any person liable for the payment of any of the indebtedness, (b) extend the time or otherwise alter the terms of payment of any of the indebtedness, (c) accept additional security therefor of any kind, including deeds of trust or mortgages, (d) alter, substitute or release any property securing the indebtedness; Trustee may, at any time, and from time to time, upon the written request of Beneficiary (a) consent to the making of any map or plat of the property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting this deed of trust or the lien or charge thereof, (d) reconvey, without any warranty, all or any part of the property.

4. Upon payment in full of all sums secured hereby, and performance of all obligations of the Trustor hereunder, the Trustee shall reconvey, without warranty, the estate vested in it hereby. The grantee in any reconveyance made pursuant to this deed of trust may be described as "the person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. In the event that anyone shall establish and exercise any right to develop, bore for or mine for any water, gas, oil or mineral under the surface of the property, all indebtedness secured by this Deed of Trust shall immediately become due and payable at the option of Beneficiary and any monies that may become due

Exhibit "A"—(Continued)

or payable to Trustor as royalty, rent, damages or other compensation by reason of the exercise of any such rights, are hereby assigned to Beneficiary as additional security. Upon default by Trustor in the payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, or upon conveyance by Trustor of said property, or upon the divestment in any manner of his title thereto, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of its election to cause to be sold the property herein described, to satisfy the obligations secured hereby, and shall cause such notice to be recorded in the office of the Recorder of each county wherein said property, or some part thereof, is situated. Beneficiary may rescind any such notice before Trustee's sale by executing a notice of rescission and recording the same. The recordation of such notice shall constitute also a cancellation of any prior declaration of default and demand for sale, and of any acceleration of maturity of indebtedness affected by any prior declaration or notice of default. The exercise by Beneficiary of the right of recission shall not constitute a waiver of any default then existing or subsequently occurring, nor impair the right of the Beneficiary to execute other declarations of default and demand for sale, or notices of default and of election to cause the property to be sold, nor otherwise affect

Exhibit "A" —(Continued)

the note or deed of trust, or any of the rights, obligations or remedies of the Beneficiary or Trustee hereunder.

5. At least three months having elapsed between the recordation of the notice of default and the date of sale, Trustee, having first given notice of sale as then required by law, and without demand on Trustor, shall sell the property at the time and place of sale fixed by it in the notice of sale, either as a whole or in separate parcels, and in such order as the Trustee may determine, at public auction to the highest bidder for cash, in lawful money of the United States of America, payable at the time of sale. Trustee may postpone sale of all or any portion of the property by public announcement at the time of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the previous postponement, and without further notice it may make such sale at the time to which the same shall be so postponed. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, expressed or implied. The recital in any such deed of any matters or facts, stated either specifically or in general terms, or as conclusions of law or fact, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at the sale. After deducting all costs, fees and expenses of Trustee and of this trust, including costs of evidence of title in connection with the sale, the Trus-

Exhibit "A"—(Continued)

tee shall apply the proceeds of the sale to the payment of all sums then secured hereby, in such order and manner as may be required by the Beneficiary; the remainder, if any, to be paid to the person or persons legally entitled thereto. If Beneficiary shall elect to bring suit to foreclose this deed of trust in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage, Beneficiary shall be entitled to a reasonable sum to be fixed by the court as attorney fees expended in the prosecution of said action.

6. As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect all rents, issues and profits of said property, or of any personal property located thereon, with or without taking possession of the property affected hereby, reserving unto the Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, to collect and retain such rents, issues and profits as they accrue and become payable. Upon any such default Beneficiary may at any time, without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, and in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid,

Exhibit "A"—(Continued)

and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine; also perform such acts of repair, cultivation, irrigation or protection, as may be necessary or proper to conserve the value of the property; also lease the same or any part thereof for such rental, term, and upon such conditions as its judgment may dictate; also prepare for harvest, harvest, remove, and sell any crops that may be growing upon the premises, and apply the proceeds thereof upon the indebtedness secured hereby. The entering upon and taking possession of said property, the collection of such rents, issues and profits, and the application thereof as aforesaid, shall not waive or cure any default or notice of default hereunder, or invalidate any act done pursuant to such notice. Trustor also assigns to Trustee, as further security for the performance of the obligations secured hereby, all prepaid rents and all monies which may have been or may hereafter be deposited with said Trustor by any lessee of the premises herein described, to secure the payment of any rent, and upon default in the performance of any of the provisions hereof, Trustor agrees to deliver such rents and deposits to the Trustee.

7. Any Trustor who is a married woman hereby expressly agrees that recourse may be had against her separate property for any deficiency after the sale of the property hereunder.

Exhibit "A"—(Continued)

8. Should proceedings be instituted to register title of the property under any land title law, Trustor will pay upon demand all sums expended by Trustee or Beneficiary, including attorney fees, and forthwith deliver to Beneficiary all evidence of title.

9. The pleading of any statute of limitations as a defense to any and all obligations secured by this deed of trust is hereby waived to the full extent permissible by law.

10. Trustor further agrees that Beneficiary may from time to time and for periods not exceeding one year, in behalf of the Trustor, renew or extend any promissory note secured hereby, and said renewal or extension shall be conclusively deemed to have been made when endorsed on said promissory note or notes by the Beneficiary in behalf of the Trustor.

11. Beneficiary may, from time to time, substitute another Trustee in the place of the Trustee herein named, to execute this trust. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all the title, powers and duties conferred upon the Trustee herein named. Each such appointment and substitution shall be made by written instrument executed by the Beneficiary, containing reference to this deed of trust sufficient to identify it, which, when recorded in the office of the County Recorder of the county or counties in which the property is situ-

Exhibit "A"—(Continued)

ated, shall be conclusive proof of the proper appointment of the successor trustee.

12. This deed of trust shall inure to and bind the heirs, devisees, legal representatives, successors and assigns of the parties hereto. All obligations of each Trustor hereunder are joint and several. The rights or remedies granted hereunder, or by law, shall not be exclusive, but shall be concurrent and cumulative.

If a mailing address is set forth opposite any Trustor's signature hereto, and not otherwise, the undersigned Trustor shall be deemed to have requested that a copy of any notice of default, and of any notice of sale hereunder, be mailed to said Trustor at said address.

Mailing Address For Notices
Street, City and State

SIERRA TITLE COMPANY, a California Corp., San Andreas, California.

Signature of Trustor
/s/ By JOHN J. TOUHY,
Its President,

/s/ By JOHN F. FELDMEIER,
Its Secy.

State of California,
County of Calaveras—ss.

On this 13th day of February in the year one

Exhibit "A"—(Continued)

thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Secretary respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

s/ EMMA THOMPSON,

Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Deed of Trust and Assignment of Rent. Sierra Title Company, (A Corporation), Trustor, to Corporation of America, Trustee, for Bank of America National Trust and Savings Association, Beneficiary. Recorded at the Request of Sierra Title Co. Feb. 13, 1953 at 45 minutes past 2 o'clock P.M. in Book 78 Official Records pages 419-420 Calaveras County Records. Signed (Illegible) Recorder. Fee $6.00.

EXHIBIT "B"

Mortgage of Chattels
(Inanimate)

This Mortgage, made this 13th day of February, 1953, by Sierra Title Company, a Corporation, of San Andreas, County of Calaveras, State of California, by occupation ..... mortgagor (it is distinctly understood that the word "mortgagor" referring to the mortgagor, as used herein, is intended to and does includes the masculine, feminine and neuter genders and the singular and plural numbers), to Bank of America National Trust and Savings Association, a National Banking Association duly organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the City and County of San Francisco, California, by occupation a banker, mortgagee,

Witnesseth, That said Mortgagor does hereby mortgage to said Mortgagee all the following described personal property, together with all replacements and substitutions therefor, and all repairs and additions thereto, and the increase and increment thereof, located at ..... Street, in ....., County of Calaveras, State of California, described as follows, to-wit:

[List of Personal Property appearing here is the same as Exhibit "C" set out at page 14 down to and including "1 Sawdust Burner" on page 17.]

Exhibit "B"—(Continued)

together will all other personal property which Mortgagor now owns or holds or may hereafter acquire whether the same is specifically enumerated herein or not, and located on the above described premises.

This mortgage is intended to secure and does hereby secure the payment, in lawful money of the United States of America to the said Mortgagee, at its office hereinbefore set forth, of the following:

(a) The Promissory note or notes below described, executed by Mortgagor and payable to Mortgagee:

Amount of Note: $6,000.00: Date of Note: February 1953, with interest. Payable: in Thirty-Six (36) successive monthly instalments commencing with Mar. 13, 1953.

(b) All sums that may be advanced and expenditures that may be made by the Mortgagee to or on behalf of the Mortgagor, and all indebtedness and obligations that may be incurred by the Mortgagor or any of them, to the Mortgagee, its successors or assigns, subsequent to the execution of this mortgage; also all present and future demands of any kind or nature which Mortgagee, its successors or assigns, may have against the Mortgagor or any of them, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not, or whether otherwise secured or not, or whether existing at the time of the execution of this mortgage or arising thereafter; provided that the

Exhibit "B"—(Continued)

maximum amount to be secured hereby and remaining unpaid at any one time shall not exceed the total sum of Twelve Thousand and no/100 Dollars ($12,000.00).

(c) All sums or amounts that are necessarily advanced or expended by the Mortgagee, its successors or assigns, for the maintenance or preservation of the property or any part thereof described in this mortgage;

(d) All extensions or renewals, and successive extensions or renewals, of the note or notes above described, or of the indebtedness represented thereby, or of any other or further indebtedness at any time owing by Mortgagor to Mortgagee, however the same may be evidenced, and in whatever form it may be, whether represented by notes, drafts, open accounts or otherwise, and all interest thereon, for the payment of which this mortgage shall stand as a continuing security until full and complete payment shall have been made.

Said mortgagor hereby declares and hereby warrants to said mortgagee that the said mortgagor is the absolute owner and in possession of all of said mortgaged property hereinabove described, and that the said mortgaged property is free and clear of all liens, encumbrances and adverse claims whatsoever;

Said mortgagor promises and agrees: To pay the principal sum of said promissory note or notes, together with interest thereon, at the time and in the

Exhibit "B"—(Continued)

manner therein provided, and to pay when due all sums secured hereby, and to perform each and every covenant and condition of this mortgage; during the continuance hereof to properly care for and keep said mortgaged property herein described in first class condition, order and repair and insured against all loss or damage by fire and such other casualties as may be designated by the mortgagee and in amount required by the mortgagee, not to exceed, however, the value of said mortgaged property, or the amount due the mortgagee, in some insurance company, or companies, to be approved by the mortgagee, the policies of which insurance shall be payable in case of loss to the mortgagee and shall be delivered to and held by the mortgagee as security; to pay all taxes, liens or assessments of whatsoever kind or description that may be levied against said mortgaged property, or any part thereof, when the same shall become due and prior to the time when the same shall become delinquent; to comply and use said mortgaged property and each and every part thereof in strict conformity with all laws, ordinances, regulations and statutes with reference to the use, operation and registration thereof; not to remove, or permit to be removed, any part of said property from the premises on which said property is now situated, without the written consent of said mortgagee, or to sell or to attempt to sell, or further mortgage the said property without such consent, and to immediately notify the mortgagee in the event of any damage to

Exhibit "B"—(Continued)

said property from any cause whatsoever; that all replacements, substitutions, accretions, repairs and additions to, improvements, increases and increments, of said mortgaged property shall immediately become subject to all the provisions of this mortgage; to permit the mortgagee at any time during the continuance hereof to enter upon the premises on which said property is situated and examine said property and, upon demand of said mortgagee, to make a written report to said mortgagee concerning the mortgaged property; to pay the mortgagee, or its successor, in the event suit be brought to foreclose this mortgage, an attorney fee of One Hundred Dollars ($100.00) and a further sum of five per cent (5%) of the amount due in the event that said action is prosecuted to judgment.

If the mortgagor fails to make any payment or perform any act which he is obligated to perform hereby, then the mortgagee, without demand, or notice to the mortgagor, or any successor in interest of the mortgagor, or any of them, may make such payments or perform such acts and incur any liability or expend whatever amounts in its absolute discretion it may deem necessary therefor, and all sums incurred or expended by the mortgagee or its successor under the terms hereof shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred or expended and shall bear interest until paid at the rate of seven per cent (7%) per annum and shall be secured hereby.

Exhibit "B"—(Continued)

If the mortgagor defaults in the performance of any covenant contained in this mortgage, or the payment of any obligation or indebtedness secured hereby, the mortgagee, without notice or demand, at any time, may take possession of said mortgaged property and repair, care for, lease or manage the said property and perform any act necessary to conserve the value or income thereof and to apply the proceeds in the manner as specified herein upon the sale of said property. And the mortgagee, or its successor, shall be entitled to the appointment of a receiver by a court of competent jurisdiction to assist it in performing and doing any of the acts hereinabove set forth. All expenses incurred by the mortgagee in the taking possession of said property or in the performance of any of the acts hereinabove specified, including the expense of the appointment of a receiver, shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred, and shall bear interest at the rate of seven per cent (7%) per annum until paid, and shall be secured hereby.

If default is made in the prompt payment, when due, of any sum secured hereby or in the performance of any promise contained herein, the mortgagee may declare all sums secured hereby immediately due and payable without demand or notice and said mortgagee may at once proceed to foreclose this mortgage by proceeding as provided for in the Code of Civil Procedure of the State of California,

Exhibit "B"—(Continued)

or it may, at its option, enter upon the premises where said mortgaged personal property may be and take possession thereof; and take such measures as to the mortgagee may be deemed necessary or proper for the care or protection thereof and remove and/or sell and/or dispose of said mortgaged property as a pledge at either public or private sale, with or without notice (the said mortgagor hereby expressly waiving demand of performance, notice of sale and any advertisement of sale), and at said sale the mortgagee or its successor may become the purchaser and from the proceeds of sale retain all costs and charges incurred by it in the taking or sale of said property and in the care and protection thereof, including all reasonable attorney's fees incurred and may apply the balance toward the payment of all sums due said mortgagee and secured hereby and shall dispose of the surplus remaining as provided by law.

It is understood and agreed that all remedies allowed the mortgagee under the law and under the terms of this mortgage are and shall be concurrent and cumulative, and may be exercised and enforced as hereinabove and by law provided without reference to the time or manner of foreclosure or enforcement of any other security for said indebtedness whether held under deed of trust, mortgage, pledge or otherwise.

In Witness Whereof, the said mortgagor has hereunto set the hand and seal of said mortgagor

Exhibit "B"—(Continued)

the day and year first hereinabove written.

[Seal] SIERRA TITLE COMPANY,
A Corporation,

[Seal] /s/ By JOHN J. TOUHY,
President,

[Seal] /s/ By JOHN F. FELDMEIER,
Secretary.

State of California,
County of Calaveras—ss.

On this 13th day of February in the year one thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Secretary respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

[Seal] /s/ EMMA THOMPSON,
Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Exhibit "B"—(Continued)

Mortgage of Chattels (Inanimate). Recorded at the Request of Sierra Title Co., Feb. 13, 1953 at 46 minutes past 2 o'clock P.M. in Book 78 of Official Records, page 421 et seq., Calaveras County Records. Signed (Illegible) Recorder. Fee $3.75.

EXHIBIT "C"

MORTGAGE OF CHATTELS

(Inanimate)

This Mortgage, made this 9th day of April, 1953, by Sierra Wood Products Corporation, a corporation, of Toyon, County of Calaveras, State of California, by occupation, Wood Products, mortgagor (it is distinctly understood that the word "mortgagor" referring to the mortgagor, as used herein, is intended to and does include the masculine, feminine and neuter genders and the singular and plural numbers), to Bank of America National Trust and Savings Association, a National Banking Association duly organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the City and County of San Francisco, California, by occupation a banker, mortgagee,

Witnesseth: That said Mortgagor does hereby mortgage to said Mortgagee all the following described personal property, together with all replacements and substitutions therefor, and all repairs and additions thereto, and the increase and incre-

Exhibit "C"—(Continued)

ment thereof, located at ..... Street, in Toyon, County of Calaveras, State of California, described as follows, to wit:

Turner 42" Tandem Twin Band Resaw with Bevelling and Rounding Attachments. Machine Serial #RB561: 2 HP Sterling Speed Trol: Allis Chalmers 5 HP Bevelling Motor, Serial #225: Two Allis Chalmers 30 HP Main Drive Motors, Serial #588587 & #588594.

Turner 42" Tandem Twin Band Resaw, Serial #563, with Turner Ripping Attachment, Serial #A471: 2 HP Sterling Speed Trol: Two Westinghouse 30 HP Main Drive Motors, Serial #4807, Style 1441939: General Electric 15 HP Profile Motor #PE2390.

This mortgage is intended to secure and does hereby secure the payment, in lawful money of the United States of America to the said Mortgagee, at its office hereinbefore set forth, of the following:

(a) The Promissory note or notes below described, executed by Mortgagor and payable to Mortgagee:

Amount of Note: $7,500.00; Date of Note: April 9, 1953; with interest. Payable: One Thousand Two Hundred Fifty and No 100 Dollars ($1,250.00) on the 9th day of October, 1953, plus interest at the rate of Six per cent (6%) and One Thousand Two Hundred Fifty and No 100 Dollars ($1250.00) on the 9th day of each and every April and October

Exhibit "C"—(Continued)

until the 9th day of April, 1956, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

(b) All sums that may be advanced and expenditures that may be made by the Mortgagee to or on behalf of the Mortgagor, and all indebtedness and obligations that may be incurred by the Mortgagor or any of them, to the Mortgagee, its successors or assigns, subsequent to the execution of this mortgage; also all present and future demands of any kind or nature which Mortgagee, its successors or assigns, may have against the Mortgagor or any of them, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not, or whether otherwise secured or not, or whether existing at the time of the execution of this mortgage or arising thereafter; provided that the maximum amount to be secured hereby and remaining unpaid at any one time shall not exceed the total sum of Fifteen Thousand and No/100 Dollars ($15,000.00).

(c) All sums or amounts that are necessarily advanced or expended by the Mortgagee, its successors or assigns, for the maintenance or preservation of the property or any part thereof described in this mortgage;

(d) All extensions or renewals, and successive extensions or renewals, of the note or notes above described, or of the indebtedness represented thereby, or of any other or further indebtedness at

Exhibit "C"—(Continued)

any time owing by Mortgagor to Mortgagee, however the same may be evidenced, and in whatever form it may be, whether represented by notes, drafts, open accounts or otherwise, and all interest thereon, for the payment of which this mortgage shall stand as a continuing security until full and complete payment shall have been made.

Said mortgagor hereby declares and hereby warrants to said mortgagee that the said mortgagor is the absolute owner and in possession of all of said mortgaged property hereinabove described, and that the said mortgaged property is free and clear of all liens, encumbrances and adverse claims whatsoever;

Said mortgagor promises and agrees: To pay the principal sum of said promissory note or notes, together with interest thereon, at the time and in the manner therein provided, and to pay when due all sums secured hereby, and to perform each and every covenant and condition of this mortgage; during the continuance hereof to properly care for and keep said mortgaged property herein described in first class condition, order and repair and insured against all loss or damage by fire and such other casualties as may be designated by the mortgagee and in amount required by the mortgagee, not to exceed, however, the value of said mortgaged property, or the amount due the mortgagee, in some insurance company, or companies, to be approved by the mortgagee, the policies of which insurance shall be payable in case of loss to the mortgagee

Exhibit "C"—(Continued)

and shall be delivered to and held by the mortgagee as security; to pay all taxes, liens or assessments of whatsoever kind or description that may be levied against said mortgaged property, or any part thereof, when the same shall become due and prior to the time when the same shall become delinquent; to comply and use said mortgaged property and each and every part thereof in strict conformity with all laws, ordinances, regulations and statutes with reference to the use, operation and registration thereof; not to remove, or permit to be removed, any part of said property from the premises on which said property is now situated, without the written consent of said mortgagee, or to sell or to attempt to sell, or further mortgage the said property without such consent, and to immediately notify the mortgagee in the event of any damage to said property from any cause whatsoever; that all replacements, substitutions, accretions, repairs and additions to, improvements, increases and increments, of said mortgaged property shall immediately become subject to all the provisions of this mortgage; to permit the mortgagee at any time during the continuance hereof to enter upon the premises on which said property is situated and examine said property and, upon demand of said mortgagee, to make a written report to said mortgagee concerning the mortgaged property; to pay the mortgagee, or its successor, in the event suit be brought to foreclose this mortgage, an attorney fee of One Hundred Dollars ($100.00) and a further sum of

Exhibit "C"—(Continued)

five per cent (5%) of the amount due in the event that said action is prosecuted to judgment.

If the mortgagor fails to make any payment or perform any act which he is obligated to perform hereby, then the mortgagee, without demand, or notice to the mortgagor, or any successor in interest of the mortgagor, or any of them, may make such payments or perform such acts and incur any liability or expend whatever amounts in its absolute discretion it may deem necessary therefor, and all sums incurred or expended by the mortgagee or its successor under the terms hereof shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred or expended and shall bear interest until paid at the rate of seven per cent (7%) per annum and shall be secured hereby.

If the mortgagor defaults in the performance of any covenant contained in this mortgage, or the payment of any obligation or indebtedness secured hereby, the mortgagee, without notice or demand, at any time, may take possession of said mortgaged property and repair, care for, lease or manage the said property and perform any act necessary to conserve the value or income thereof and to apply the proceeds in the manner as specified herein upon the sale of said property. And the mortgagee, or its successor, shall be entitled to the appointment of a receiver by a court of competent jurisdiction to assist it in performing and doing any of the acts

Exhibit "C"—(Continued)

hereinabove set forth. All expenses incurred by the mortgagee in the taking possession of said property or in the performance of any of the acts hereinabove specified, including the expense of the appointment of a receiver, shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred, and shall bear interest at the rate of seven per cent (7%) per annum until paid, and shall be secured hereby.

If default is made in the prompt payment, when due, of any sum secured hereby or in the performance of any promise contained herein, the mortgagee may declare all sums secured hereby immediately due and payable without demand or notice and said mortgagee may at once proceed to foreclose this mortgage by proceeding as provided for in the Code of Civil Procedure of the State of California, or it may, at its option, enter upon the premises where said mortgaged personal property may be and take possession thereof; and take such measures as to the mortgagee may be deemed necessary or proper for the care or protection thereof and remove and/or sell and/or dispose of said mortgaged property as a pledge at either public or private sale, with or without notice (the said mortgagor hereby expressly waiving demand of performance, notice of sale and any advertisement of sale), and at said sale the mortgagee or its successor may become the purchaser and from the proceeds of sale retain all costs and charges incurred by it in the taking or sale of said property and in

Exhibit "C"—(Continued)

the care and protection thereof, including all reasonable attorney's fees incurred and may apply the balance toward the payment of all sums due said mortgagee and secured hereby and shall dispose of the surplus remaining as provided by law.

It is understood and agreed that all remedies allowed the mortgagee under the law and under the terms of this mortgage are and shall be concurrent and cumulative, and may be exercised and enforced as hereinabove and by law provided without reference to the time or manner of foreclosure or enforcement of any other security for said indebtedness whether held under deed of trust, mortgage, pledge or otherwise.

In Witness Whereof, the said mortgagor has hereunto set the hand and seal of said mortgagor the day and year first hereinabove written.

[Seal] SIERRA WOOD PRODUCTS CORPORATION,
A Corporation,
[Seal] /s/ By JOHN J. TOUHY,
[Seal] /s/ By JOHN F. FELDMEIER.

State of California,
County of Calaveras—ss.

On this 17th day of April in the year one thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing

Exhibit "C"—(Continued)

therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Assistant Secretary of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

[Seal] /s/ EMMA THOMPSON,
Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Mortgage of Chattels (Inanimate). Sierra Wood Products Corporation, a corporation, Mortgagor, to Bank of America National Trust and Savings Association, Stockton Main Office, Stockton, Mortgagee. Dated April 9, 1953. Filed for record at the request of Bank of America National Trust and Savings Association. Recorded at request of Sierra Title Co., April 20, 1953, at 40 minutes past 1 o'clock P.M. in Book 74 of Official Records, page 491 et seq., Calaveras County Records. Signed (Illegible) Recorder, by Signed (Illegible) Deputy. Fee $2.75.

[Endorsed]: Filed October 21, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Above Named and to Lloyd H. Burke, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, Joseph O. Greaves, Attorney, Office of Regional Counsel, Internal Revenue Service, Its Attorneys:

You and Each of You Will Please Take Notice that the undersigned will move this court in the courtroom of the Master Calendar Judge, in the U. S. Post Office Building, 7th and Mission Streets, San Francisco, California, on November 4, 1957, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in accordance with the prayer of the complaint on file herein on the ground that no genuine issue as to any material fact exists and that plaintiff is entitled to judgment as a matter of law.

Said motion will be made and based upon the pleadings, papers and Pre-trial Order on file herein.

Dated: October 24, 1957.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,
/s/ By ELDON C. PARR,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 25, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Samuel B. Stewart, George Chadwick, Jr., Eldon C. Parr, 300 Montgomery Street, San Francisco 4, California, Attorneys for Plaintiff.

Please take notice that the undersigned will on Monday, November 4, 1957, at the hour of 9:30 a.m., in the courtroom of the United States District Judge presiding over the law and Motion Calendar, United States Court House and Post Office Building, 7th and Mission Streets, San Francisco, California, move for summary judgment dismissing the complaint on the ground that the defendant, United States of America, is entitled to judgment as a matter of law.

LLOYD H. BURKE,
United States Attorney,
/s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the United States of America, by and through its undersigned attorneys, and pursuant to Rule 56(a), Federal Rules of Civil Procedure, moves for summary judgment dismissing the complaint in the above-entitled action.

The pleadings in the case and the Pre-Trial Order set forth all necessary and material facts. There being no issue of fact, the defendant moves for judgment dismissing the complaint, on the grounds that the defendant, United States of America, is entitled to judgment as a matter of law.

LLOYD H. BURKE,
United States Attorney,
/s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having been argued, briefed and submitted for decision,

It Is Ordered that judgment be entered in favor of plaintiff on the authority of United States v. Boyd, 246 F.2d 477, certiorari denied December 9, 1957.

Plaintiff shall prepare findings of fact, conclusions of law and judgment in accordance with this order.

Dated: December 26, 1957.

/s/ GEO. B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed December 26, 1957.

In The United States District Court, Northern District of California, Southern Division

No. 36485

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

A motion of the Plaintiff above named for summary judgment in its favor in accordance with the prayer of the complaint on file herein having been duly brought on to be heard, and a motion by the Defendant above named for summary judg-

ment in its favor dismissing the action having been duly brought on to be heard, and the Court having made an order pursuant thereto granting Plaintiff's motion and directing that judgment be entered herein in favor of Plaintiff;

It Is Ordered, Adjudged and Decreed:

(1) That Defendant's motion for summary judgment be, and the same is hereby denied;

(2) That Plaintiff's motion for summary judgment be, and the same is hereby granted;

(3) That Plaintiff is the owner of the real property situate, lying and being in the County of Calaveras, State of California, bound and particularly described as follows:

> [Descriptions are the same as set out at pages 9-14 of this printed record.]

and Defendant has no estate, lien, right, title or interest whatever in or to said real property, and Defendant is forever barred and enjoined from asserting any claim whatever in or to said real property adverse to Plaintiff:

(4) Plaintiff is the owner of the following described personal property located in the County of Calaveras, State of California:

> [List of Personal Property is the same as set out at page 14 down to and including 1 "Sawdust Burner" on page 17.]

and Defendant has no estate, lien, right, title or interest whatever in or to said personal property,

and Defendant is forever barred and enjoined from asserting any claim whatever in or to said personal property adverse to Plaintiff.

Dated Jan. 20, 1958.

/s/ GEO. B. HARRIS,
United States District Judge.

Approved as to form.

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel,
Internal Revenue Service.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR.
/s/ ELDON C. PARR,
Attorney for Plaintiff.

Entered in Civil Docket 1 20/58.

[Endorsed]: Filed January 20, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in the above entitled action, dated and filed January 20, 1958.

LLOYD H. BURKE,
United States Attorney,
s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s JOSEPH O. GREAVES,
Office of Regional Counsel,
Internal Revenue Service.

Affidavit of Mailing Attached.

[Endorsed]: Filed March 12, 1958.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1957

May 27—Filed petition on removal from Superior Court, County of Calaveras with copy of — complaint & summons.

July 10—Filed answer of United States.

Aug. 19—Filed notice by plaintiff of motion for pre-trial, Aug. 26, 1957.

Aug. 26—Ordered after hearing, motion granted and case assigned for pre-trial Sept. 20, 1957. (Goodman.)

1957

Sep. 20—Pre-trial conference completed. Counsel to present order. (Carter.)

Oct. 24—Filed pre-trial order. (Carter.)

Oct. 25—Filed notice by plaintiff of motion for summary judgment, Nov. 4, 1957 with memo.

Oct. 28—Filed notice & motion by deft. for summary judgment, Nov. 4, 1957 with memo.

Nov. 4—Ordered motion for summary judgment continued to Nov. 12, 1957. (Harris.)

Nov. 12—Ordered after hearing, memos. to be filed in 10 days and motions to dismiss and for summary judgment continued to Nov. 22, 1957 for submission. (Harris.)

Nov. 18—Filed memo. of deft. in opposition to motion for summary judgment.

Nov. 21—Filed suppl. memo. of plaintiff in support of motion for summary judgment.

Nov. 22—Ordered case submitted. (Harris.)

Dec. 26—Filed order granting motion of plaintiff for summary judgment. Counsel to prepare findings, conclusions & judgment. (Harris.)

Dec. 27—Mailed copies order to counsel.

1958

Jan. 20—11 AM Entered summary judgment—filed Jan. 20, 1958—for plaintiff, that plaintiff is owner of real estate involved herein and personal property as set forth and deft. has no estate therein. Deft. permanently enjoined from asserting any claim whatever thereto. (Harris.)

1958

Jan. 20—Mailed notices.

Mar. 12—Filed notice of appeal by USA.

Mar. 12—Mailed notices.

Apr. 16—Filed order extending time to docket appeal to June 6, 1958. (Harris.)

May 27—Filed appellant's designation of record on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by the Attorneys for the Appellant:

Petition for Removal with copy of Complaint and Summons.

Answer of United States of America.

Pre-trial order.

Notice and Motion by plaintiff for Summary Judgment.

Notice and Motion by defendant for Summary Judgment.

Order Granting Motion of Plaintiff for Summary Judgment.

Judgment.

Notice of Appeal.

Order Extending Time to File Designation.

Designation of Record by Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of May, 1958.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 16034. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Bank of America National Trust & Savings Association, a national banking association, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellee.

APPELLANT'S AMENDED STATEMENT OF POINTS

Comes now appellant, the United States of America, and cites the following points upon which it intends to rely for reversal of the judgment of the District Court:

1. The District Court lacked jurisdiction to hear and determine the suit instituted by the plaintiff-appellee against the United States.

2. Assuming that the District Court had jurisdiction, it erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

LLOYD H. BURKE,
United States Attorney,
/s/ By LYNN J. GILLARD,
Assistant U. S. Attorney.

Certificate of Service Attached.

[Endorsed]: Filed June 16, 1958. Paul P. O'Brien, Clerk.

[fol. 66]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Minute entry of argument and submission—November 4, 1958 (omitted in printing).

[fol. 67]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 2, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 68]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

OPINION—February 2, 1959

JAMESON, District Judge:

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April

9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual notice of the sale was given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1] [fol. 69] On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States con-

[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided • • •) • • •

"• • • all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. • • •" (Article VI, Sec. 5).

sented to be sued in the State Court.[3] The District Court acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign im- [fol. 70] munity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hear-

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[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit . . . in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410 (a)).

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1444).

[5] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842; Seattle Association of Credit Men, 9 Cir. 1957, 240 F. 2d 906.

[6] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

[8] 26 U.S.C.A. § 7403, which provides for civil action in a district court of the United States to enforce federal tax liens.

ing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b) and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real prop- [fol. 71] erty, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.[9]

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int. Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

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[9] The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1026; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

[10] Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues that subsection (c) relates only to foreclosure actions and not to quiet title actions.

[fol. 72] The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest, penalty and costs) "shall be a lien in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."[12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the require-

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[11] Section 2410 (c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

[12] United States v. Bess, 357 U. S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

ments of § 3670, state law is inoperative to prevent the attachment of liens created by the United States." [13] And, as this Court said in Bank of Nevada v. United States, 1957, 251 F. 2d 820, 824, cert. den. 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F. 2d [fol. 73] 311, cert. den. 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder."

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[13] Id. at 56, 57. See also Fidelity & Deposit Co. v. New York City Housing Auth., 2 Cir. 1957, 241 F. 2d 142, 144.

[14] Carpenter v. Smallpage, 220 Cal. 129, 29 P. 2d 841 (1934); Streiff v. Darlington, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

(107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens on real estate may be released, but also to limit the right to sue therefore and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute . . . , under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in United States v. Boyd, 1957, 246 F. 2d 477, cert. den. 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In United States v. Boyd, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from [fol. 74] the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S. C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

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[15] United States v. Kensington Shipyard & Drydock Corp., 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

[16] The dissenting opinion in the Metropolitan Life case succinctly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject to destruction by exercise of the power of sale . . . The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also United States v. Cless, 3 Cir. 1958, 254 F. 2d 590; United States v. Brosnan, W.D. Pa. 1958, 164 F. Supp. 357.

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to understand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410 (c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those [fol. 75] rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice.

Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an appli- [fol. 76] cation with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

[File endorsement omitted]

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[17] The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

[fol. 77]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

JUDGMENT—Filed and entered: February 2, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

[fol. 78]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—May 1, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause on petition for rehearing, be forthwith filed by the Clerk.

[fol. 79]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

OPINION ON PETITION BY APPELLEE FOR REHEARING—
May 1, 1959

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and particularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States."[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the [fol. 80] United States and in the manner prescribed by Congress.

[1] United States v. Alabama, 1941, 313 U.S. 274, 282, 61 S.Ct. 1101, 85 L.Ed. 1327. See also The Siren, 1868, 7 Wall. 152, 19 L.Ed. 129; Carr v. United States, 1879, 98 U.S. 433, 25 L.Ed. 209, 211; State of Minnesota v. United States, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F.2d 311, cert. denied 310 U.S. 630, 60 S.Ct. 978, 84 L.Ed. 1400.

[2] The Third Circuit reached a contrary conclusion in United States v. Cless, 1958, 254 F.2d 590, and United States v. Brosnan, 1959, ... F.2d ...

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(c) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law, —a wholly illogical result in those states, for example, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or [fol. 81] valueless government liens,[3] but where the lien,

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[3] Senate Report No. 1646, 77th Cong., 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. Welch v. Hamilton (S.D. Calif.) 33 F. (2d) 224, and U.S. v. Turner (C.C.A. 8), 47 F. (2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by

though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale.

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of federal tax liens. In our opinion this question must be answered in the negative. A valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

[File endorsement omitted]

[fol. 82] Clerk's Certificate to foregoing transcript (omitted in printing).

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inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

[4] Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

[fol. 84]

SUPREME COURT OF THE UNITED STATES

No. 183, October Term, 1959

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and one and one half hours are allowed for oral argument. The case is set for argument immediately following No. 137.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI

2 RESPONDENTS' ANSWER OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

3 BRIEF FOR THE UNITED STATES

4 BRIEF FOR APPELLEES

5 PETITION FOR WRIT OF CERTIORARI

6 MEMORANDUM FOR THE UNITED STATES

7 PETITIONER'S BRIEF

8 BRIEF FOR THE UNITED STATES

9 PETITIONER'S REPLY BRIEF

10 PETITIONER'S SUPPLEMENTAL MEMORANDUM

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No.

137

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[illegible], PETITIONER

[illegible], ET AL.

[illegible] TO THE UNITED STATES [illegible]

[illegible]

[illegible],
Solicitor General,
[illegible],
[illegible],
[illegible],
[illegible],
Attorneys,
[illegible], Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BROSNAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 26a–35a) is reported at 164 F. Supp. 357. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 10–17) is reported at 264 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1959. (Appendix A, *infra*, p. 17.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by a mortgagee in a state court extinguishes a junior federal tax lien on the property where the United States had not been joined as a party to the proceeding pursuant to federal statute.

STATUTES INVOLVED

The statutes involved, Sections 6321, 6322, 6323(a), 6325 (a), (b) and (d), 7403 and 7424 of the Internal Revenue Code of 1954 and 28 U.S.C. 2410 are printed in Appendix C, *infra*, pp. 32–38.

STATEMENT

The facts are undisputed and are fully detailed in the opinions of the District Court (R. 26a–35a) and the Court of Appeals (Appendix A, *infra*, pp. 10–17). They may be summarized as follows:

The taxpayers are George H. and Gladys M. Parkman and the Mountain Engineering Company, a corporation controlled by the Parkmans. On January 28, 1948, the Parkmans purchased from J. D. and Martha M. Berg 175 acres in Moon Township Pennsylvania. In making this purchase the Parkmans executed a purchase money mortgage in the sum of $45,000, and a mortgage bond in the sum of $90,000. The property was conveyed back and forth between the Parkmans and the Mountain Engineering Company a number of times, the conveyances all being subject to the purchase money mortgage. (Appendix A, *infra*, pp. 10–11.)

At a time when the corporation owned the property, certain federal tax liens attached to it and were recorded. Subsequently, an additional tax lien arising from a tax liability of the Parkmans attached to the property at a time when they owned the property. The tax liens were all junior to the mortgage. (Appendix A, *infra*, p. 11.)

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955, caused a confession of judgment to be entered on the bond in the amount of $43,135 plus interest from June 1, 1955. A writ of fieri facias for the sale of the property was issued to the sheriff, but the sale was postponed while the surviving mortgagee petitioned for and received from the Pennsylvania Court of Common Pleas a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings under the consent provisions of 28 U.S.C. 2410. No answer was filed and an order issued purporting to join the United States as a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest. (Appendix A, *infra*, p. 11.)

The property was sold by the sheriff on January 3, 1956, and was bid in by Brosnan and Jacob for $6,203. This amount covered only the cost of the sale and outstanding local taxes. On January 3, 1957, the Government attempted to redeem the property under 28 U.S.C. 2410(c) by tendering to Brosnan a check for $6,575.42 representing the amount bid at the sheriff's sale, plus interest. This tender was re-

fused as totally inadequate in amount. (Appendix A, *infra*, pp. 11–12.)

The United States brought the present action in the federal district court on July 12, 1957, seeking alternative relief. First, under Section 7403 of the Internal Revenue Code of 1954, the Government sought to foreclose its liens by asking the District Court to determine the relative priorities of liens and to order a sale of the property and distribution of the proceeds in accordance with the determined priorities. Alternatively, in the event the District Court found that the Government had been joined as a party to the confessed judgment and execution sale, the Government prayed for a decree that a proper redemption from the sale had been executed. (R. 26a.)

The District Court refused to grant either form of requested relief and dismissed the Government's complaint. It held that the United States was not made a party to the foreclosure proceedings within 28 U.S.C. 2410, since judgment was already entered when the rule to show cause issued. However, it went on to conclude that the tax liens were nevertheless extinguished by the sale of the property on execution. Finally, it held that even if the Government had a right to redeem the property under 28 U.S.C. 2410(c), the attempted redemption was insufficient in amount. (R. 26a–35a.)

The Government's appeal was limited to the issue of whether its federal tax lien could be extinguished in the quasi-judicial confession of judgment foreclosure and sale when it had not been properly joined as a party. The Court of Appeals affirmed, holding

that joinder of the Government in such a proceeding is necessary only where local law requires it, and that under local law the Government's tax liens were extinguished by the foreclosure of a security interest prior in time to the tax liens. (Appendix A, *infra*, pp. 12–17.)

REASONS FOR GRANTING THE WRIT

1. Four Courts of Appeals have considered the question of whether junior federal tax liens on real property are extinguished when the property is sold in foreclosure of senior mortgages under a state procedure which does not require the joinder of junior lienors in a judicial proceeding. Thus far the courts are evenly divided. In the instant case and in *United States* v. *Boyd*, 246 F. 2d 477 (C.A. 5), certiorari denied, 355 U.S. 889, it was held that the junior tax liens were wiped out by a foreclosure sale under a senior mortgage. However, the Ninth Circuit in *United States* v. *Bank of America Nat. Trust & Savings Assn.*, decided February 2, 1959, opinion on rehearing decided May 1, 1959, Appendix B, *infra*, pp. 18 to 31, and the Sixth Circuit in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311, certiorari denied, 310 U.S. 630, reached a contrary result, holding that once federal tax liens attach to the property they may be removed only in accordance with applicable federal statutes.[1] Accordingly, the latter cases hold, in the absence of a procedure sanc-

[1] Sections 6325, 7403 and 7424 of the Internal Revenue Code of 1954, Appendix C, *infra*, pp. 32–36. See also, 28 U.S. C. 2410, Appendix C, *infra*, pp. 36–38.

tioned by the applicable federal statutes, that the tax liens are unaffected by such foreclosure sales and remain for enforcement in later proceedings. See also *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9, 12 (C.A. 3); *United States* v. *City of Greenville*, 118 F. 2d 963 (C.A. 4); *Jones* v. *Tower Production Co.*, 120 F. 2d 779 (C.A. 10); *Miners Sav. Bank of Pittston, Pa.* v. *United States*, 110 F. Supp. 563, 570 (M.D. Pa.). The fact that the *Boyd, Metropolitan Life Ins. Co.* and *Bank of America* cases involved a power of sale contained in a mortgage while the instant case involves a sale in execution of a confessed judgment is not a controlling distinction. The legal principles involved are identical, the divergence of judicial opinion expressed in these cases cannot be reconciled, and the conflict has been specifically recognized by the Courts of Appeals involved.[2]

2. The decision of the Court of Appeals, we believe, is erroneous.

(a) A lien for federal taxes upon all property and rights to property is created by Section 6321 of the Internal Revenue Code of 1954, Appendix C, *infra*, p. 32. This lien continues, according to Section 6322, Appendix C, *infra*, p. 32, until the liability is satisfied or becomes unenforcible by reason of lapse of time. However, in addition to providing for the lien for taxes, the federal statutes also provide for

[2] The District Court here recognized the conflict (R. 32a), as did the Court of Appeals (Appendix A, *infra*, p. 15, fn. 9, p. 16). See also the opinions in *Bank of America*, Appendix B, *infra*, pp. 25–26, 29, fn. 2, wherein the Ninth Circuit says that the Third and Fifth Circuits reached contrary conclusions.

its removal. Under Section 6325 of the 1954 Code, Appendix C, *infra*, pp. 32–34, the Commissioner can release the lien if the tax liability is satisfied or unenforcible. If there is a lien on the same property senior to the tax lien (the precise situation in the instant case), Section 7424 (Appendix C, *infra*, pp. 35–36) establishes a procedure whereby the senior lienor can proceed judicially to foreclose the Government's lien. Additionally, 28 U.S.C. 2410, Appendix C, *infra*, pp. 36–38, provides consent to the joinder of the United States in a foreclosure action in a State or District Court with jurisdiction over the subject matter, subject to the removal provisions of 28 U.S.C. 1444, and to strict notice requirements. Finally, the Government may proceed, as here, to foreclose its lien under Section 7403 of the Internal Revenue Code of 1954, Appendix C, *infra*, pp. 34–35. By these detailed provisions Congress has provided a complete and exclusive system for the removal of Government liens, and the Court of Appeals erred, we believe, in its conclusion (Appendix A, *infra*, p. 14) that these provisions were not intended to be of general application.[8]

(b) Both the District Court (R. 34a) and the Court of Appeals (Appendix A, *infra*, p. 11) recognized that the tax liens attached to the real property involved in this case, but went on to hold that these liens were divested in the subsequent sale to which the Government was not made a party. Under the decisions of this Court it is well settled that a "pro-

[8] The District Court held (R. 30a) that there was a proceeding commonly used in Pennsylvania under which the United States could properly be joined as a party under 28 U.S.C. 2410.

ceeding against property in which the United States has an interest is a suit against the United States". *Minnesota* v. *United States*, 305 U.S. 382, 386; *United States* v. *Alabama*, 313 U.S. 274, 282. Since the United States was not made a party to the foreclosure proceedings, the foreclosure and sale constitute a suit against the sovereign without its consent and is therefore not binding upon the United States. *United States* v. *Clarke*, 8 Pet. 436; *United States* v. *Michel*, 282 U.S. 656; see also, opinion on rehearing in *United States* v. *Bank of America Nat. Trust & Savings Assn.*, *supra*.

(c) The Court of Appeals also erred (Appendix A, *infra*, p. 16) in following the Pennsylvania rule that the execution sale relates back to the date of the original mortgage and thus divests the Government's lien. Decisions of this Court have established that state law concepts of relation back cannot effect an extinguishment of federal tax liens. See e.g. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50.

3. The question presented in this case does not involve priority of liens. The Government concedes that its tax liens are junior and that it is entitled only to whatever excess remains after satisfaction of the prior mortgage. However, it should be entitled to that excess. As the situation now stands the decision below amounts to a holding that a mortgagee may proceed in an *ex parte* manner to obtain a confessed judgment and hold an execution sale, without making the United States a party, and, unless the Government learns of the sale and buys in, it is forever precluded from collecting any taxes from this prop-

erty, regardless of the fact that the property may have a considerable value in excess of the prior liens. The result is that the Government's liens are extinguished in the same proceeding by which the prior lienors receive a windfall. Such an anomalous result can be easily avoided by following the exclusive statutory procedures provided by Congress for the removal of federal liens.

CONCLUSION

The question presented vitally affects many property transactions throughout the country and is important to the uniform collection of taxes. The decision below is admittedly in conflict with the holdings of other Courts of Appeals and involves an important question of federal law decided in a way in conflict with the applicable decisions of this Court.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
JAMES P. TURNER,
Attorneys.

JUNE 1959.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 12711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1958

Before BIGGS, *Chief Judge,* and MCLAUGHLIN and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed March 26, 1959)

By MCLAUGHLIN, *Circuit Judge.*

On January 28, 1948, Martha M. Berg and her husband, J. D. Berg, conveyed to George H. and Gladys M. Parkman 175 acres in Moon Township, Pennsylvania. The Parkmans gave back a purchase money mortgage in the sum of $45,000 which was duly recorded and a mortgage bond in the sum of $90,000. Thereafter the property was conveyed a number of times back and forth between the Parkmans and Mountain Engineering Company, a corporation con-

trolled by the Parkmans; these conveyances were all subject to the purchase money mortgage.

During a period when the corporation owned the property certain federal tax liens attached to it and were recorded. Thereafter an additional federal tax lien arising from a tax liability of the Parkmans attached to the property and was recorded at a time when the Parkmans held the property. The tax liens were all junior to the mortgage.

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955 caused a confession of judgment to be entered on the bond. The judgment was for $43,135 plus interest from June 1, 1955. Subsequently a writ of fieri facias for the sale of the property issued to the sheriff; upon application, however, the sale was postponed and the surviving mortgagee petitioned the Pennsylvania Court of Common Pleas for a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings. The rule was granted and served upon the United States. No answer was filed, so eighty-nine days after service the United States was made a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest.

The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. The amount of the bid went to satisfy costs of the sale, and for various outstanding local taxes.

On January 3, 1957, one year after the sale the government attempted to redeem the property [1] through the tender by an agent to Brosnan of a check for $6,575.42, which represented the amount bid at the

[1] 28 U.S.C. 2410(c) (1952).

sheriff's sale, plus interest. Brosnan refused it as totally inadequate to effect a redemption. Brosnan and Jacob have since claimed that an effective redemption would have required a tender of $55,591.28, the amount of their asserted interest in the property.

The United States subsequently brought this action under § 7403, Internal Revenue Code of 1954,[2] to enforce its lien. The district court thus was presented with the question of whether the government lien was still enforcible.

The court held, 164 F. Supp. 357 (W.D. Pa. 1958), that the United States had not been made a party to the foreclosure proceedings in the state court by the attempted invocation in that proceeding of 28 U.S.C. § 2410 (1952) because no attempt was made to bring in the United States until after judgment had been entered on the confession of judgment. But [illegible] that the lien had nonetheless been divested simply by reason of its being a junior lien.

The government argues that § 7403, Internal Revenue Code 1954, footnote 2 supra, directs and requires that a decree for sale of the property in question be

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[2] That section reads in pertinent part:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof * * * the Attorney General * * * may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States * * *."

"(c) *Adjudication and decree.*—The court shall * * * proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

entered here. It is plain, however, that a sale may be decreed only "* * * where a claim or interest of the United States * * * is established." Thus the issue presented is whether after the sale on execution following the confession of judgment the United States still held any interest in the property.

For its claim that it continued to hold an interest in the property, the government's basic premise is that once a lien has been established by federal law it remains until it is satisfied or becomes unenforcible by lapse of time. The government asserts that the lien can be satisfied other than by payment only by compliance with one of a number of other federal statutes.[3] It is urged that when these statutes are taken together a plain intent on the part of the Congress to furnish exclusive means for removal of federal liens is made out. Since assertedly none of these provisions has previously been complied with, the government concludes that the lien remains for enforcement in this proceeding.

The claim advanced by the government that state law in no way controls federal tax liens which have attached to property is too broad;[4] the cases cited for this proposition stand more narrowly for the tenet that the priority of a lien of the United States for unpaid taxes relative to other liens always involves a federal question.[5] In this case there is no question

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[3] § 6322, Internal Revenue Code, 1954; § 3671 Internal Revenue Code, 1939.

[4] §§ 6325, 7403, 7424, Internal Revenue Code, 1954; 28 U.S.C. § 2410 (1952).

[5] Reliance in this case on *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9 (3 Cir. 1948) is misplaced, since the lien held by the United States there was superior to all others.

[6] E.g., *United States* v. *New Britain*, 347 U.S. 81 (1954); *United States* v. *Texas*, 314 U.S. 480 (1941); *Ersa, Inc.* v. *Dudley*, 234 F. 2d 178 (3 Cir. 1956).

of priority, it being conceded that the liens of the United States were junior.

For its conclusion that the federal statutes make out a scheme by which Congress intended to furnish the only means for extinguishing even junior liens held by the United States, the government has relied heavily on the legislative history of what is now 28 U.S.C. § 2410 (1952).[7] The House Report[8] states that without the legislation involved there is no way in which a cloud upon title caused by a junior lien held by the United States can be removed when a prior mortgage is being foreclosed, since there is no statute to authorize making the United States a party to such a proceeding. The government would conclude from this that a junior lien in favor of the United States remains unaffected when foreclosure of the senior lien is had without making the United States party thereto.

But this court has already held that the purpose of § 2410 was to permit the joining of the United States in foreclosure proceedings on a more senior lien in jurisdictions where joinder would be necessary for estopping the junior lienor from thereafter asserting his claim. *United States* v. *Cless*, 254 F. 2d 590 (3 Cir. 1958). The Cless case decided that where, as in Pennsylvania, such joinder was not necessary to divest a junior lien, the United States did not have to be joined in order to divest its junior lien. We conclude that the government's position is not convincing and that Congress never intended government-held junior liens not to be subject to divestment by foreclosure proceedings carried out in the state courts

[7] 46 Stat. 1528 (1931).

[8] H. Rep. No. 95, 71st Cong. 2d Sess.

without joinder of the United States.* Thus state law must be looked to in order to determine those rights and incidents arising from the federally created lien which are not prescribed by federal law. See *United States* v. *Bess*, 357 U.S. 51, 55 (1958).

In *United States* v. *Boyd*, 246 F. 2d 477, 483 (5 Cir. 1957), cert. den. 355 U.S. 899, a case closely similar to this one, the court perceptively pointed out that it is the consequence of the "* * * prior lien and the right of enforcement under it, which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination * * * that this has been the effect of enforcement of the senior lien."

Pennsylvania law requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property under the writ of fieri facias which was issued in this matter. Pa. Stat. Ann. tit. 21, § 804; tit 12, §§ 2441–2444. Whether this form of notice might raise constitutional questions of due process under *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), when the identity of persons holding a junior interest in the property is or should be known to the senior mortgagee is of no concern in the present situation; it is clear that notice of this foreclosure was given to the United States.

The buyer at the Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the

* We cannot agree with the decision of the Ninth Circuit (which is based on an assumption to the contrary) in *United States* v. *Bank of America National Trust & Savings Association*, ——F. 2d——, opinion filed February 2, 1959.

one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, § 2447. When the execution is on a judgment for a mortgage debt, the execution relates back to the time of giving the mortgage. *West Arch Building & Loan Assn.* v. *Nichols,* 303 Pa. 434 (1931); *Moore* v. *Schell,* 99 Pa. Super. 81 (1930). The United States consequently retains no interest in the property.

The government suggests that *Metropolitan Life Insurance Co.* v. *United States,* 107 F. 2d 311 (6 Cir. 1939), rather than the Boyd opinion, expresses the law for this case. But in that decision the court conceived of the proceeding as one for the divestiture of an existing lien, rather than as one to determine the more basic question of the very existence of the lien.[10]

A question remains as to whether the United States had any right to redeem the property under 28 U.S.C. § 2410(c) (1952), and if it did, whether the right was effectively exercised by the tender of only $6,575.42. Without dealing with the effect of the government's present argument regarding inapplicability of the section to this case and so passing the question of whether a right of redemption is conferred only when foreclosure occurs under § 2410, it is plain in any event that the tender was insufficient in amount. One

[10] For adverse comment on *Metropolitan Life Insurance Co.* v. *United States, supra,* see Notes, 53 Harv. L.R. 894 and 49 Yale L.J. 1106. At pp. 1108 and 1109 of the latter it is said: "in arriving at its result, the majority failed to distinguish between releasing a specific lien and adjudicating a specific lien to be non-existent. Under this view, an income tax lien once it has properly attached, assumes some absolute status, destructible only upon submission of the premises to resale, in accordance with the provisions of the statute. Destructibility of the tax debtor's interest, by reason of limitation on its extent, and consequent failure of the lien for want of a res are ignored as possibilities."

who seeks to redeem is proceeding on the hypothesis that the mortgage has never been foreclosed as to him. He can lift the mortgage only by paying it in full. *Collins* v. *Riggs,* 81 U.S. (14 Wall.) 491 (1872). It is undisputed that the unsatisfied mortgage debt for which the property was sold amounted to $43,135 plus interest.

Since the United States has demonstrated no right to the property, the judgment will be affirmed.

A true Copy:
Teste:

CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

[Caption omitted.]

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

MARCH 26, 1959.

APPENDIX B

United States Court of Appeals for the Ninth Circuit

No. 16034, Feb. 2, 1959

UNITED STATES OF AMERICA, APPELLANT,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before HEALY and CHAMBERS, *Circuit Judges*, and JAMESON, *District Judge*

JAMESON, *District Judge:*

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April 9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual

notice of the sale was given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1]

On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States consented to be sued in the State

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[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided * * *) * * *

"* * * all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. * * *" (Article VI, Sec. 5).

Court.[3] The District Court acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign immunity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section

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[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit * * * in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410(a)).

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1441).

[5] *Wells* v. *Long*, 9 Cir. 1947, 162 F. 2d 842; *Seattle Association of Credit Men*, 9 Cir. 1957, 240 F. 2d 906.

[6] *Wells* v. *Long*, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hearing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b), and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real property, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.

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[8] 26 U.S.C.A. § 7403, which provides for civil action in a district court of the United States to enforce federal tax liens.

[9] The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1028; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int. Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues

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[10] Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

[11] Section 2410(c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by

that subsection (c) relates only to foreclosure actions and not to quiet title actions.

The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest, penalty and costs) "shall be a lien in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." [12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by the United States." [13] And, as this Court said in *Bank of Nevada* v. *United States*, 1957, 251 F. 2d 820, 824, cert. den., 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, "the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The

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the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

[12] *United States* v. *Bess*, 357 U.S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

[13] *Id.* at 56, 57. See also *Fidelity & Deposit Co.* v. *New York City Housing Auth.* 2 Cir. 1957, 241 F. 2d 142, 144.

interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. *Metropolitan Life Ins. Co.* vs. *United States*, 6 Cir. 1939, 107 F. 2d 311, cert. den., 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder." (107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens

[14] *Carpenter* v. *Smallpage*, 220 Cal. 129, 29 P. 2d 841 (1934); *Streiff* v. *Darlington*, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

on real estate may be released, but also to limit the right to sue therefor and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute * * *, under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in *United States* v. *Boyd*, 1957, 246 F. 2d 477, cert. den., 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In *United States* v. *Boyd*, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

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[15] *United States* v. *Kensington Shipyard & Drydock Corp.*, 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

[16] The dissenting opinion in the *Metropolitan Life* case succintly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to understand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410(c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached

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to destruction by exercise of the power of sale * * *. The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also *United States* v. *Cless*, 3 Cir. 1958, 254 F. 2d 590; *United States* v. *Brosnan*, W.D. Pa. 1958, 164 F. Supp. 357.

to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410 Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the

trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an application with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

(Endorsed:) Opinion. Filed Feb. 2, 1959.

PAUL P. O'BRIEN,
Clerk.

United States Court of Appeals for the Ninth Circuit

No. 16034, May 1, 1959

UNITED STATES OF AMERICA, APPELLANT

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, A NATIONAL BANKING ASSOCIATION, APPELLEE

ON PETITION BY APPELLEE FOR REHEARING

Before HEALY and CHAMBERS, *Circuit Judges,* and JAMESON, *District Judge*

JAMESON, *District Judge:*

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and par-

[17] The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

ticularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States".[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the United States and in the manner prescribed by Congress.

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(c) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law—a wholly illogical result in those states, for example, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government

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[1] *United States* v. *Alabama*, 1941, 313 U.S. 274, 282, 61 S. Ct. 1101, 85 L. Ed 1327. See also *The Siren*, 1868, 7 Wall. 152, 19 L. Ed. 129; *Carr* v. *United States*, 1879, 98 U.S. 433, 25 L. Ed. 209, 211; *State of Minnesota* v. *United States*, 1939, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; *Metropolitan Life Ins. Co.* v. *United States*, 6 Cir. 1939, 107 F. 2d 311, cert. denied 310 U.S. 630, 60 S. Ct. 978, 84 L. Ed. 1400.

[2] The Third Circuit reached a contrary conclusion in *United States* v. *Cless*, 1958, 254 F. 2d 590, and *United States* v. *Brosnan*, 1959, —— F. 2d ——.

may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or valueless government liens,[3] but where the lien, though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale.

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of federal tax liens. In our opinion this question must be answered in the negative. A

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[3] Senate Report No. 1646, 77th Cong. 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

"It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch* v. *Hamilton* (S.D. Calif.), 33 F. (2d) 224, and *U.S.* v. *Turner* (C.C.A. 8), 47 F. (2d) 86.

"In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgages have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its

valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed May 1, 1959.

PAUL P. O'BRIEN,
Clerk.

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mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

[4] Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

APPENDIX C

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C., Supp. V, 6321)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C., Supp. V, 6322)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*— Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C., Supp V, 6323).

SEC. 6325. [As amended by Sec. 77, Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606]. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.*—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; or

(2) *Bond accepted.*—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or

his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

* * * * * *

(d) *Effect of Certificate of Release or Discharge.*—A certificate of release or of discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * * *

(26 U.S.C., Supp. V, 6325)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(26 U.S.C., Supp. V, 7403.)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File.*—

(1) *Request for institution of proceedings by United States.*—Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.*—If the Secretary or his delegate fails to authorize the filing of such

civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.*—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.*—Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.*—All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

(26 U.S.C., Supp. V, 7424)

Some of the liens involved herein arose under the Internal Revenue Code of 1939. Sections 3670, 3671, 3672, 3673, 3674 and 3675 (26 U.S.C. 3670, 3671, 3672, 3673, 3674 and 3675), of the Internal Revenue Code of 1939 contain substantially the same provisions as Sections 6321, 6322, 6323 and 6325 of the 1954 Code as set forth above.

28 U.S.C.:

SEC. 2410 [As amended by the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 119] *Actions affecting property on which United States has lien*

(a) Under the conditions prescribed in this section and section 1444 of this title for the

protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided, with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the

date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If, after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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No. 137

In the Supreme Court of the United States

October Term, 1958

UNITED STATES OF AMERICA,

Petitioner

v.

WILLIAM J. BROSNAN, et al.

RESPONDENTS' ANSWER OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BRENNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

United States of America,

Petitioner

vs.

William J. Brosnan, Francis H. Jacob, Martha M. Berg, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company,

Respondents

October Term, 1958

RESPONDENTS' ANSWER OPPOSING CERTIORARI

William L. Jacob and William L. Jacob, Jr., Esqs., attorneys for William L. Brosnan and Francis H. Jacob, respondents, hereby answer the petition of the United States for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit.

QUESTION INVOLVED

Whether a sheriff's sale of real property in a state court based on a judgment confessed on bond accompanying first lien purchase money mortgage divests junior federal tax lien when the United States is joined in the execution proceedings as a party defendant by the state court on a rule issued and served on the Government more than sixty days prior to the sale, and the Government fails to bid at the sale or act to delay the sale or transfer the proceedings to federal court and also fails to redeem the property within one year after the sale as provided in 28 U.S.C. 2410.

STATEMENT OF FACTS

Because of the prior adjudication in the District Court the facts presented by the respondents, Brosnan and Jacob, are to be accepted as true.

Brosnan and Jacob acquired, by assignment and for value, a purchase money mortgage and judgment confessed thereon by mortgagee against the mortgagor-owner. Subsequent to the purchase of the property and to the recording of said mortgage, the Government filed several tax liens for various obligations due it from the original mortgagors and a corporation owned and controlled by them to which the property had been conveyed. After default, judgment was confessed against the original mortgagors in the Common Pleas Court of Allegheny County, Pennsylvania and an execution writ of fieri facias was issued directing the Sheriff of said county to levy upon, advertise and sell said property in order to satisfy the mortgage debt, all in accordance with Pennsylvania law which has been in existence for a century or more.

After the issuance of the writ the sale thereon was postponed by order of said Common Pleas Court and a rule was taken out on the Government to show cause why it should not be joined as a party defendant. The rule was served according to law. It was returnable in sixty days. The government did nothing and eighty-nine days after its service the rule was made absolute and the Government was joined in the execution as a

party defendant. The sale was held January 3, 1956 and in accordance with law the junior tax liens of the Government were thereby divested, subject only to the redemption privileges accorded the Government by 28 U.S.C. 2410. The Government fully recognized this as a fact and attempted to redeem the property on January 3, 1957 failing only because the amount of its tender was woefully inadequate and no tender at all was made to one of the co-tenant owners.

The subject action was commenced by the Government on July 12, 1957 seeking to sustain redemption or in the alternative to have the District Court hold that its junior liens had not been divested by the execution proceedings in the Pennsylvania court. The District Court denied the validity of the attempted redemption and also concluded that the junior liens were divested from this property. Admittedly those liens continue in full force against other property still owned by the original mortgagors and their said corporation.

At the argument before the Third Circuit Court of Appeals the Government chose to abandon its effort to sustain redemption and limited the issue to the status of its junior liens. The Circuit Court affirmed the District Court as appears more fully in its opinion (Appendix A, pp. 12-17, Government's Petition).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The question of divestiture of junior federal tax liens upon execution sales on prior judgments or liens can best be settled and determined by the courts dealing with the same in the various circuits. The Supreme Court has denied certiorari on several occasions in somewhat similar cases and should do so again in this instance. Naturally, each case must in the final analysis rest on its own facts. In the instant case the facts are so confining that both the respondents and the Government could with propriety contend that it was decided by the Circuit Court "on its own peculiar facts".

1. The Government now argues only against the divestiture of its liens, admitting that its abortive attempt to redeem was futile. It claims in effect that Brosnan and Jacob, the execution creditors who bought the property at the sheriff sale, are getting a windfall because the federal liens, by the lower court decision, are divested. There is nothing wrong with advancing such an argument if it be made at the proper time. No testimony whatsoever about value was presented at the trial and certainly it is too late for the Government to inject such an argument now. It is mere conjecture. So far as the record discloses it would be impossible to say that the Government would realize one dollar if it were permitted to sell this subject property after paying the costs thereof and respondents' debt. Hence, at

this time it cannot be argued much less presumed that any windfall has resulted.

2. Execution sales in Pennsylvania should be and properly are governed by local law. The same may be said of each state in the Union. It well may be that Pennsylvania law governing sheriff sales and divestiture of liens differs from that in California or Maine or Florida. The climate, the manners and customs and the people are different in those states; why should the law be any exception? The autonomy of each state should be recognized. The Government will continue to enjoy many privileges that are not granted to its citizens, but when it seeks to protect its lien for taxes is it asking too much for it to take a place in line with other lien holders when a piece of property on which it admittedly has a junior lien comes up for sheriff sale on a first mortgage? From the very essence of the lien of a first mortgage one could conclude quite logically that a foreclosure on it would divest any and all subsequent liens. To rule otherwise in Pennsylvania would be to forfeit local laws and customs that have been in practice for over a century. Specifically, when the Government is given adequate notice of an impending sheriff sale of real estate upon which it has a junior tax lien, how can it be argued that it is infringing upon governmental prerogative to expect it to take steps to protect its lien by appearing at the sale and bidding or by asking for a stay of execution or by transferring the proceedings to a federal court? No sound argument can be advanced except to say that a federal junior tax lien is sacred, untouchable and above and beyond the scope of local law. So far as the ordi-

nary general practitioner of the law is concerned, that is unthinkable.

The question presented in this case has no bearing whatsoever on the collection of federal taxes. The question is limited and restricted solely to the divestiture of a junior federal tax lien by a sheriff sale on a prior first mortgage. Furthermore, the tax lien in the instant case is not extinguished by the execution sale; it is only divested from the subject property so as to make that property readily saleable in the open market in accordance with accepted standards and local law and custom. Such divestiture in nowise touches the collectibility of those taxes. The Government still has its lien against the original mortgagors as taxpayers and their other property and can enforce collection from them. The argument advanced by the Government about procedures to remove Government liens is all well and good if it were directed to the original mortgagors, the ones who owe the taxes. If they wanted these tax liens removed from their property, then they must follow the procedures mentioned, but that argument has no application to the respondents. They owe no money to the federal government. They are not "taxpayers" as the statute mentions.

In the cases of *United States vs. Boyd*, 246 F. 2d 477 (C.A. 5), and *Metropolitan Life Insurance Company vs. United States* (C.A. 6), certiorari was denied by your Honorable Court, 355 U.S. 889 and 310 U.S. 630. We see no reason why it should be granted in the case at bar. The decision in each of those circuits is suitable to its own locale. Even if the decision in the instant case and the decision in *United States vs. Bank*

of America (C.A. 9) are considered, it will be found that they were not decided under the same or similar state execution procedures. Each state has its own such procedure. The most that a determination of the instant case by your Honorable Court could accomplish would be to settle the question of divestiture of junior federal tax liens upon execution sales *in Pennsylvania* after confession of judgment on a bond accompanying a mortgage. Such a decision would have no salutary effect in other states which require actual notice to junior lien holders or in still other states where a redemption period follows execution. The legal principles in the above cited cases when analyzed cannot be said to be even similar, much less identical, as the Government contends.

3. The opinions of the District Court and of the Court of Appeals clearly state the grounds upon which each determined that the junior federal tax liens in the instant case were divested. Reference is made thereto as we earnestly contend that those decisions are logically correct, legally sound and should not be disturbed.

CONCLUSION

The decisions of the District Court and of the Court of Appeals for the Third Circuit merely pronounce that on execution sales in the State of Pennsylvania in conformity with local law and consistent with federal statutes, junior federal tax liens like other liens, are divested. Such a decision cannot be of na-

tional scope because of the restricted factual situation. It is local law and should be regarded as such.

Therefore, we humbly submit that this petition for a writ of certiorari, as in the Boyd case and in the Metropolitan case, supra, should be denied.

WILLIAM L. JACOB,
WILLIAM L. JACOB, JR.,
Attorneys for Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 137

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM J. BROSNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 23–31) is reported at 164 F. Supp. 357. The opinion of the Court of Appeals (R. 84–89) is reported at 264 F. 2d 762.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1959. (R. 90.) The petition for a writ of certiorari was filed on June 23, 1959, and was granted on October 12, 1959. (R. 92.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by a mortgagee in a state court

extinguishes a junior federal tax lien on the property, where the United States had not been joined as a party to the proceeding pursuant to federal statute.

STATUTES INVOLVED

Sections 6321, 6322, 6323(a), 6325 (a), (b) and (c), 7403 and 7424 of the Internal Revenue Code of 1954, 28 U.S.C. 2410, and pertinent portions of the Pennsylvania statutes are set forth in the Appendix, *infra*, pp. 28–36.

STATEMENT

The facts, which are undisputed and are fully detailed in the opinions of the District Court (R. 23–31) and the Court of Appeals (R. 84–89), may be summarized as follows:

The taxpayers are George H. and Gladys M. Parkman and the Mountain Engineering Company, a corporation controlled by the Parkmans. On January 28, 1948, the Parkmans purchased from J. D. and Martha M. Berg 175 acres in Pennsylvania. In making this purchase the Parkmans executed a purchase money mortgage for $45,000, and a mortgage bond for $90,000. The property was conveyed back and forth between the Parkmans and the Mountain Engineering Company a number of times, the conveyances all being subject to the purchase money mortgage. (R. 84–85).

At a time when the corporation owned the property, federal withholding, unemployment and social security taxes totalling $40,403.34 were assessed against the corporation and became liens upon the property. Subsequently, an additional tax lien, arising from an

income tax deficiency of $9,767.68 assessed against the Parkmans at a time when they owned the property, attached to the property. The tax liens, all of which were recorded, were all junior to the mortgage. (R. 24, 81, 85.)

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955, caused a confession of judgment to be entered on the bond in the amount of $43,135, plus interest from June 1, 1955. A writ of *fieri facias* for the sale of the property was issued to the sheriff, but the sale was postponed while the surviving mortgagee petitioned for, and received from the Pennsylvania Court of Common Pleas, a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings under 28 U.S.C. 2410. No answer was filed and an order issued purporting to join the United States as a party to the proceedings. During the intervening time William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest. (R. 24, 85.)

The property was sold by the sheriff on January 3, 1956, and was bid in by Brosnan and Jacob for $6,203. This amount covered only the cost of the sale and outstanding local taxes. (R. 23, 85.)

On January 3, 1957, the Government attempted to redeem the property under 28 U.S.C. 2410(c) by tendering to Brosnan a check for $6,575.42 representing the amount bid at the sheriff's sale, plus interest. This tender was refused as totally inadequate in amount. (R. 24, 85.)

The United States brought the present action in the

federal district court on July 12, 1957, seeking alternative relief. First, under Section 7403 of the Internal Revenue Code of 1954, the Government sought to foreclose its liens by asking the District Court to determine the relative priorities of liens and to order a sale of the property and distribution of the proceeds in accordance with the determined priorities. Alternatively, in the event the District Court found that the Government had been joined as a party to the confessed judgment and execution sale, the Government sought a decree that it had properly executed its right of redemption. (R. 4–10, 23, 86.)

The District Court refused to grant either form of requested relief and dismissed the Government's complaint. It held that the United States was not made a party to the foreclosure proceedings within 28 U.S.C. 2410, since judgment was already entered when the rule to show cause issued. However, it concluded that the tax liens were nevertheless extinguished by the sale of the property on execution. Finally, it held that even if the Government had a right to redeem the property under 28 U.S.C. 2410(c), the amount offered was insufficient. (R. 27–31.) The court acknowledged (R. 30) that under Pennsylvania law "a mortgage is a lien only and not an estate"; that, as to all persons other than the mortgagee, "the mortgagor is regarded as the owner and title is in him"; and that "'[t]he Government lien in the instant case thus fastened upon a title to real property."

The Government's appeal was limited to the issue of whether its federal tax lien could be extinguished by the confession of judgment foreclosure and sale

when it had not been properly joined as a party. The Court of Appeals affirmed (R. 84–89). It held that joinder of the Government in such a proceeding is necessary only where local law requires it (R. 88); that Pennsylvania law "requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property under the writ of *fieri facias* which was issued in this matter" (*ibid.*); that under Pennsylvania law an execution "on a judgment for a mortgage debt * * * relates back to the time of giving the mortgage" (R. 89); and that "[t]he United States consequently retains no interest in the property" (*ibid.*).

SUMMARY OF ARGUMENT

The court below held that foreclosure of a real estate mortgage lien pursuant to procedures authorized by Pennsylvania law extinguished a federal tax lien on the property, even though the United States was not made a party to the state proceedings. The rationale of the decision appears to be that because state law provides for extinguishment of the junior non-Government liens through such a procedure, junior federal tax liens are similarly extinguished. We submit, however, that the comprehensive and detailed scheme adopted by Congress for the discharge of federal tax liens constitutes the exclusive method by which Congress intended such liens to be extinguished; and that state proceedings, to which the United States is not a party, therefore cannot wipe out federal liens.

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There is no issue here with respect to priorities. The federal tax liens are admittedly junior to the mortgage lien, and the Government is seeking only the right to apply any excess remaining after the prior lien has been fully satisfied, toward the satisfaction of its admittedly valid second liens. The mortgagees cannot claim unfairness as long as their prior claim is fully satisfied.

A. The Internal Revenue Code contains specific and detailed provisions governing creation and discharge of federal tax liens. Section 6322 of the Internal Revenue Code of 1954 provides that, unless another date is specifically fixed by law, the tax lien "shall continue" until the tax assessment has been satisfied or becomes unenforceable by reason of lapse of time. Three different procedures for discharging the liens are provided by the Code. (1) The Secretary of the Treasury or his delegate may release a lien when the liability is satisfied or has become legally unenforceable, or a proper bond is furnished (Section 6325). (2) The United States may institute in a federal district court an action to enforce its lien, in which all persons having liens upon or claiming an interest in the property are made parties and in which the court may "finally determine the merits of all claims to and liens upon the property" (Section 7403). (3) Any person having a prior recorded lien upon or interest in property subject to a tax lien may, if the Secretary of the Treasury rejects his request that the Government institute a suit pursuant to Section 7403, *supra*, himself institute an action in the district court "for a final

determination of all claims to or liens upon the property in question" (Section 7424).

In addition to the foregoing provisions of the Internal Revenue Code governing the extinguishment of federal tax liens, an alternative procedure for their discharge is provided in the general federal lien statute (28 U.S.C. 2410). That act permits the United States to be named as a party "in any civil action or suit" in any federal district court, or in any state court having jurisdiction of the subject matter, "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." The United States may remove any state court action to the federal district court. A "judicial sale" in an action under this section has the same effect in discharging the property from the federal liens as local law provides; however, where real estate is sold to satisfy a lien prior to that of the United States, the latter has one year within which to redeem.

B. The foregoing detailed procedures governing the discharge of federal tax liens constitute, we believe, the exclusive method by which Congress intended such liens to be extinguished. Their legislative history indicates that Congress recognized that without such provisions there was no way other than payment by which the federal liens could be discharged. In consenting to suit against the United States in 28 U.S.C. 2410, Congress conditioned such consent upon various requirements designed "amply and fully [to] protect * * * the rights of the Federal Government" (H. Rep. No. 95, 71st Cong., 2d Sess., p. 2). To per-

mit federal liens to be discharged in state proceedings to which the United States is not a party would deny federal property the protection which Congress thus sought to give it.

In the instant case, the mortgagor's interest constituted "property or rights to property" of the taxpayer, within the meaning of Section 6321 of the Code, to which the federal tax lien attached. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy" this requirement, "state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States" (*United States* v. *Bess,* 357 U.S. 51, 56–57). By the same reasoning, "state law may not destroy a tax lien which has attached" (*Commissioner* v. *Stern,* 357 U.S. 39, 47) to a taxpayer's property interest. For it is Congress which created and defined the federal tax liens, and it is Congress which determines how they are to be removed. Since Congress has intended the detailed discharge provisions to be the exclusive method for their extinguishment, it is immaterial that under Pennsylvania law a junior lien is discharged through foreclosure of a prior mortgage at a sheriff's sale, without giving the junior lienor notice or making him a party.

To permit state law and policy to govern the discharge of federal liens would create "a serious danger of conflict with the administration of the federal [lien-discharge] program" (*Pennsylvania* v. *Nelson,* 350 U.S. 497, 505). For example, Congress, in accordance with the settled rule that the United States

is an indispensable party to any proceeding against property in which it has an interest, has required that the United States be made a party to any proceeding in which a federal lien may be discharged. State proceedings, however, frequently do not require the joinder of junior lienors. Similarly, although 28 U.S.C. 2410 gives the United States one year after foreclosure through judicial sale within which to redeem, the state provisions governing redemption sometimes give no right of redemption, and sometimes more or less than one year. Moreover, to permit the various state rules to govern the discharge of federally-created tax liens would be at odds with the "cardinal principle of Congress in its tax scheme" to achieve "uniformity, as far as may be" (*United States* v. *Gilbert Associates,* 345 U.S. 361, 364).

ARGUMENT

A FEDERAL TAX LIEN CAN BE EXTINGUISHED ONLY IN ACCORDANCE WITH THE SPECIFIC DISCHARGE PROVISIONS PROVIDED BY CONGRESS, AND NOT THROUGH STATE FORECLOSURE PROCEEDINGS TO WHICH THE UNITED STATES IS NOT A PARTY

The court below held that foreclosure of a real-estate mortgage lien pursuant to procedures authorized by Pennsylvania law extinguished a federal tax lien on the property, even though the United States was not made a party to the state proceedings. The rationale of the decision appears to be that because under Pennsylvania law foreclosure of a mortgage through a sheriff's sale operates to extinguish junior

private liens, it similarly extinguishes junior federal tax liens.

We shall show, however, that Congress has adopted a comprehensive and detailed scheme for the creation and extinguishment of federal tax liens; and that the states, therefore, cannot extinguish the federal liens unless they comply with the procedures provided therefor by Congress. We believe that this conclusion follows from the basic federal statutory scheme, its legislative history, pertinent decisions of this Court defining the relationship between federal and state law in the tax-lien field, and the adverse effect upon, and conflict with, the Congressional scheme of federal tax liens that would result if each state could apply its own local foreclosure procedures to terminate the federal liens. Since the applicable federal procedures were found not to have been complied with here,[1] it follows that the state foreclosure proceedings did not operate to extinguish the federal liens.

There is no issue in this case with respect to priorities, since the federal tax liens are admittedly junior to the mortagage lien. Nor can there be any valid contention that recognizing the continued validity of the federal liens after the state foreclosure proceedings would be unfair to other property interests. For the sole question is whether, after the prior lien has been fully satisfied, the United States is entitled to utilize any excess toward the satisfaction of its admittedly valid second liens; or whether the state-court foreclosure procedures can be utilized to wipe out the federal security interests, with a consequent windfall

[1] This ruling was correct. See *infra*, n. 4, p. 15.

to subordinate interests which would otherwise have no claim against the property until the federal lien had been fully satisfied.

A. THE STATUTORY SCHEME FOR THE CREATION AND EXTINGUISHMENT OF FEDERAL TAX LIENS

Congress has provided a comprehensive policy governing federal tax liens. The Internal Revenue Code for many years has contained specific and detailed provisions dealing with both their creation and their discharge.

1. Section 6321 of the 1954 Code (Appendix, *infra*, p. 28) provides that if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." The foregoing lien, however, is not valid against any "mortgagee, pledgee, purchaser, or judgment creditor" until notice thereof has been filed by the District Director of Internal Revenue as therein provided (Section 6323, Appendix, *infra*, p. 28).

Section 6322 provides that, unless another date is specifically fixed by law, "the lien * * * shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time" (Appendix, *infra*, p. 28).

2. Three different procedures for discharge of federal tax liens are provided by the 1954 Code:

(a) Section 6325 (Appendix, *infra*, pp. 29–30) provides that the Secretary of the Treasury or his delegate may release a lien when (1) the liability is satisfied or has become legally unenforceable, or (2) a bond

is furnished conditioned on payment of the amount assessed. The section also provides for a partial discharge of the property subject to the lien, in situations where such discharge will not jeopardize the Government's security interest.

(b) Section 7403 (Appendix *infra*, pp. 30–31) authorizes the Attorney General, at the request of the Secretary of the Treasury or his delegate, to institute in a federal district court an action "to enforce the lien of the United States" upon "any property, of whatever nature" of a delinquent taxpayer, or upon property "in which he has any right, title, or interest." All persons having liens upon the property or claiming an interest therein are required to be made parties. The court is authorized to adjudicate all matters involved and to "finally determine the merits of all claims to and liens upon the property," and where a claim or interest of the United States is established, the court may decree a sale of the property and distribute the proceeds according to the interests of the United States and other parties. The instant proceeding was instituted by the United States under the provisions of this section.

(c) Section 7424 (Appendix, *infra*, pp. 31–32) provides that any person having a prior recorded lien upon or interest in property subject to a tax lien, or any person purchasing such property at a sale held to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403. If such action is not authorized within six months, such person may, after notice to the Secretary, petition the United States District Court for leave to file a civil

action "for a final determination of all claims to or liens upon the property in question."[2] The district court may grant leave to file such civil action "in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties." Upon the filing of such civil action, the district court "shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403."

3. In addition to the foregoing provisions of the Internal Revenue Code governing the extinguishment of federal tax liens, an alternative procedure for their discharge is provided in the general federal lien statute. Under 28 U.S.C. 2410 (Appendix, *infra*, pp. 32–34), the United States may be named as a party "in any civil action or suit" in any federal district court, or in any state court having jurisdiction of the subject matter, "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." Under this procedure, the complaint must set forth with particularity the interest or lien of the United States, service in state-court cases must be made upon the Attorney General and the United States Attorney, the United States is given 60 days within which to reply, and the United States may remove any state-court action to the federal district court. "A judicial sale" in an action under the section "shall have the same effect" in discharging the

[2] We have been advised that the Internal Revenue Service interprets this provision as authorizing the private party to institute suit immediately upon the Government's refusal to bring suit, without waiting for six months.

property from the federal liens "as may be provided with respect to such matters by the local law of the place where the property is situated." However, when real estate is sold to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem."[3]

B. THE FEDERAL STATUTORY PROVISIONS FOR THE DISCHARGE OF TAX LIENS PRESCRIBE THE EXCLUSIVE METHOD BY WHICH SUCH LIENS MAY BE EXTINGUISHED.

The foregoing detailed procedures governing the discharge of federal tax liens constitute, we believe, the exclusive method by which Congress intended such liens to be extinguished. For "[t]he scheme of federal regulations * * * [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230), let alone to interfere with it. Here Congress has provided three different procedures for tax-lien discharge under the Internal Revenue Code, as well as an alternative procedure under the general-lien statute. In the circumstances, we submit that there is no room for any attempt by the states to discharge such liens other than in conformity with the federal procedures.[4]

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[3] Section 2410 further provides that a sale to satisfy a lien inferior to that of the United States is made subject to that lien, unless the United States consents to the property being sold free of its liens and the proceeds being divided as the parties are entitled; that whenever the debt owing the United States is due, it may request foreclosure of its own lien; and that where property is sold to satisfy a first lien of the United States, the latter may bid at the sale.

[4] Although the surviving mortgagee attempted, under 28 U.S.C. 2410, to make the United States a party to the fore-

1. This view is supported by the legislative history of the various federal lien-discharge provisions. The provision which is now contained in Section 7424 of the 1954 Code—which authorizes the holder of a prior lien to institute a proceeding in the district court "for a final determination of all claims to or liens upon the property in question"—first appeared in the Revenue Act of 1924, 43 Stat. 253. This "new provision" was, as the Senate Committee stated (S. Rep. No. 398, 68th Cong., 1st Sess., p. 46), "designed to afford to the holder of a lien prior in time to that of the United States for taxes a method of procedure for clearing the title to the property." The committee pointed out (*ibid.*) that such a provision was necessary because:

> At the present time, in cases in which the lien prior in time to that of the United States equals or exceeds in amount the value of the property, there is no method whereby the lien for taxes

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closure proceedings, the district court held (R. 27) that "Section 2410 was not validly invoked by the mortgagee * * *." That ruling was correct. The obvious purpose of the notice requirements of Section 2410 is to give the United States an opportunity to participate in the state proceedings before any action is taken which may affect its security interests. The district court therefore correctly ruled (R. 26, emphasis added) that "to properly invoke Section 2410, the United States must be named *initially* as a defendant in the state court civil action." In the instant case, however, this requirement was not met, since "the judgment of confession on the mortgage bond had already been entered" (on June 7, 1955) when the surviving mortgagee sought to make the United States a party (on September 22, 1955). Thus, "[t]he most that can be said about the proceedings in the instant case is that an attempt was made to make the United States a party to the execution of a judgment already entered * * *" (R. 26–27).

> may be discharged without payment. Although the lien may thus be valueless to the United States, it remains a cloud on the title which the prior lienor is powerless to remove. The subdivision gives the lienor a remedy in this case.

In other words, Congress recognized when this provision was first enacted that without it there was "no method whereby the [federal] lien for taxes may be discharged without payment." And Congress specifically included the provision in order to give the senior lien holder "a method of procedure for clearing the title to the property." Thus, at that time Congress plainly was of the view that, unless some specific provision were made for discharge of federal liens, they could be removed only by payment of the Government's claim. And while the committee report does not specifically consider whether such liens could be eliminated through state-court proceedings, we believe that the necessary implication of the committee's statement is that they could not.[*] For otherwise the committee would not have stated that without the amendment there would be "no method" whereby the federal lien might be discharged without payment.

The legislative history of the general federal-lien statute (now contained in 28 U.S.C. 2410) similarly shows that it was enacted on the premise that there was no other existing method for removing liens for debts due the United States. In favorably reporting the bill that became the predecessor statute,

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[*] Further indication is found in the provision of Section 7424 which permits suit thereunder not only by the holder of a prior recorded lien but also by "any person purchasing the property at a sale to satisfy such prior lien or interest."

the House Committee stated (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1–2) that the legislation had been recommended by various real estate interests for a number of years

> * * * in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortgagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien, a debt for which he is in no way responsible and he being a person to whom the Government would in no event look for its payment.
>
> The purpose of this bill is to provide a simple and just method of proceeding in such cases, one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government. * * *
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> * * * * *
>
> * * * The law provides and equity dictates that the Government's lien in such circumstances

> should have a junior status, yet under the present practice the inability of the plaintiff to bring the United States in as a party to the proceeding to foreclose or have execution and sale on a court judgment where a Government lien is found to have been placed upon the property subsequently to the time of the plaintiff's encumbrance ties the hands of a prior lien holder by making it impossible for him to grant a clear title to the property and thus for no just reason deprives him of the benefits of his security or court judgment as the case may be.

See, also, S. Rep. No. 351, 71st Cong., 2d Sess., p. 2.

During the House debates on the measure, a question arose as to the effect of state foreclosure proceedings upon a junior federal lien. Congressman Burtness stated his understanding that a provision of the bill for release of worthless federal liens by administrative action

> would apply to a case of this sort: In many States foreclosure by advertisement is permitted, with the right of redemption. Assume that a prior lien is foreclosed, the Government has a junior lien, the time for redemption expires and the purchaser at the foreclosure sale of the prior lien gets title through the foreclosure proceedings under State laws. Presumably in a case of that sort the enforcibility of the Federal lien as a practical proposition has been wiped out, but it is still a cloud on the title. Now, in that sort of a case, could the administrative officers give relief under the amendment that is proposed without going into court in any way?

> Mr. HAWLEY. If at any time they find as a matter of fact that the Government lien is valueless they are authorized to release that lien by the pending amendment.
>
> Mr. BURTNESS. And it may become valueless for several reasons, for instance, depreciation in the value of the property, the amount of prior liens foreclosed in legal proceedings, or anything else.

At this point Congressman Graham, chairman of the House Judiciary Committee which had reported the bill, flatly stated:

> The foreclosure the gentleman speaks of could not possibly discharge the Government's lien.
>
> Mr. BURTNESS. I understand it would not be discharged * * *. [72 Cong. Rec. 3121–3122]

In granting consent to suit against the United States in order to permit removal of junior federal liens, Congress thus recognized that without that consent such liens could not be discharged, i.e., they could not be discharged merely by following local foreclosure proceedings. Furthermore, Congress imposed numerous conditions upon the right to make the United States a party (see *supra,* pp 13–14), in order "amply and fully [to] protect * * * the rights of the Federal Government." The decision below, by wiping out "the [security] rights of the Federal Government" through a state foreclosure proceeding in which the United States was not given the protection that Congress intended (see *infra,* pp. 24–25) thwarts that Congressional intent.

2. In the instant case, the district court found (R. 30) that under Pennsylvania law the mortgagor

retains the "title to real property."[5] Accordingly, the mortgagor's interest constituted "property or rights to property" of the taxpayer within the meaning of Section 6321 of the 1954 Internal Revenue Code (see *supra*, p. 11), to which the federal tax lien attached. While this federal lien was admittedly junior to the mortgage, it was nonetheless a valid lien. Upon the statisfaction and discharge of the mortgage debt, the federal lien would have first priority.

Although state law "determine[s] what property rights and interests a taxpayer actually has * * * their consequence for purposes of federal taxation is a matter of federal law" (Mr. Justice Black, dissenting, in *Commissioner* v. *Stern*, 357 U.S. 39, 48, footnote, and cases there cited). For "[t]he effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 49). Thus, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of Section 3670 [Section 6321 of the 1954 Code], state law is inoperative to prevent the attachment of liens created

[5] The finding was clearly correct. In Pennsylvania, a mortgage creates only a security interest in favor of the mortgagee; the mortgagor remains the owner of the land. *Harper* v. *Consolidated Rubber Co.*, 284 Pa. 444, 451, 131 Atl. 356, 358; *Shields* v. *Pittsburgh*, 252 Pa. 74, 76, 97 Atl. 124, 125; see *Brunn* v. *Wichser*, 75 F. 2d 25, 27–28 (C.A. 3).

by federal statutes in favor of the United States" (*United States* v. *Bess*, 357 U.S. 51, 56–57).*

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*This Court has repeatedly held, in various contexts, that state law cannot defeat or modify federal tax liens. See, for example, *Field* v. *United States*, 9 Pet. 182, holding that the priority granted the United States in the payment of its debts cannot be defeated by state insolvency laws; *United States* v. *Snyder*, 149 U.S. 210, holding that the tax lien of the United States, is not subject to state recording laws; *Burk-Waggoner Ass'n* v. *Hopkins*, 269 U.S. 110, holding that, although a partnership under state law, the taxpayer nevertheless was an association taxable as a corporation for federal income tax purposes; *Florida* v. *Mellon*, 273 U.S. 12, holding that a state law cannot affect the right of the United States to levy and collect the federal estate tax; *Morgan* v. *Commissioner*, 309 U.S. 78 (and cases cited in fn. 5, p. 81), holding that the power of appointment there involved was a "general power of appointment" for purposes of the federal estate tax law regardless of its characterization—whether "general" or "specific"—under state law; *United States* v. *Summerlin*, 310 U.S. 414, holding that the United States is not bound by provisions of state law limiting the period of filing claims against the estate of a decedent; and *United States* v. *Thompson*, 98 U.S. 486, holding that the United States is not otherwise bound by a state statute of limitations. See also *Burnet* v. *Harmel*, 287 U.S. 103, 110.

In support of the proposition that state law may not interfere with the priority of federal tax liens that have once attached to property, see *United States* v. *Security Tr. & Sav. Bk.*, *supra*, pp. 49–50; *United States* v. *New Britain*, 347 U.S. 81, 84; *United States* v. *Acri*, 348 U.S. 211, 213; *United States* v. *Liverpool & London Ins. Co.*, 348 U.S. 215; *United States* v. *Scovil*, 348 U.S. 218, 220; *United States* v. *Colotta*, 350 U.S. 808; *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010; *United States* v. *Vorreiter*, 355 U.S. 15; *United States* v. *Ball Construction Co.*, 355 U.S. 587, rehearing denied, 356 U.S. 934; *United States* v. *Hulley*, 358 U.S. 66.

The supremacy of federal over state law has also been given

We believe that similar reasoning compels the conclusion that "state law may not destroy a tax lien which has attached" (*Commissioner* v. *Stern, supra,* p. 47) to a taxpayer's property interests. For it is Congress which created and defined the federal tax liens, and it is Congress which determines how they are to be removed. As we have shown (*supra,* pp. 11–14), detailed and comprehensive procedures for such removal have been "created by federal statutes" (*Bess, supra*), in circumstances which indicate that Congress intended them to be the exclusive method for discharge. It is, therefore, immaterial that under Pennsylvania law a junior lien is discharged through foreclosure of a prior mortgage at a sheriff's sale, without giving the junior lienor notice or making him a party.

The fact, relied upon by the court of appeals (R. 89), that under Pennsylvania law an execution "on a judgment for a mortgage debt * * * relates back to the time of giving the mortgage," affords no basis for eliminating the federal liens.[7] For it is well settled

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effect in cases arising under Section 3466 of the Revised Statutes. *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *Illinois* v. *Campbell*, 329 U.S. 362, 371; *United States* v. *Waddill Co.*, 323 U.S. 353, 356–357; *United States* v. *Gilbert Associates*, 345 U.S. 361, 362.

[7] The statement of the court below (R. 88) that "it is clear that notice of this foreclosure was given to the United States" affords no basis for its decision. While such notice may satisfy the requirements of state law for extinguishing junior private liens, it is not a substitute for the procedures drawn by Congress for extinguishing federal liens. The rationale of the decision below is not that the Government had actual notice of the foreclosure, but that a federal lien may be extinguished

that "the doctrine of relation back * * * [cannot] operate to destroy * * *" an existing federal tax lien. *United States* v. *Security Tr. & Sav. Bk.*, 340 U.S. 47, 50; *New York* v. *Maclay*, 288 U.S. 290, 294. Here the district court found (R. 30) that, as between the taxpayers and the United States, the Government had a "lien * * * upon a title to real property."

Indeed, the court below previously had recognized that a federal tax lien that "has been established against property of a taxpayer" is "immune to state action," and "may only be removed as federal laws permit." *United States* v. *Kensington Shipyard & Drydock Corp.*, 169 F. 2d 9, 12 (C.A. 3). Similarly, in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311 (C.A. 6), certiorari denied, 310 U.S. 630, the Sixth Circuit, in holding that state foreclosure proceedings instituted by the first mortgagee, to which the United States was not a party, did not wipe out the federal junior tax lien, ruled (p. 313):

> * * * The Federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal and when such liens once attach, they may be lifted only as provided thereunder.

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pursuant to state foreclosure proceedings. If, under state law, a junior lien could be eliminated in foreclosure proceedings without actual notice to its holder, the theory of the court below would permit discharge of a federal lien by the same procedure. As we have shown, the basic error of the court of appeals is its failure to recognize that federal liens may be discharged only by following the procedures prescribed by Congress, and not through the procedures which the states have developed for discharging private liens.

The Ninth Circuit reached the same conclusion in the companion case here, *United States* v. *Bank of America National Trust & Savings Association*, 265 F. 2d 862, pending on writ of certiorari, No. 183, this Term. See, also, *Miners Sav. Bank of Pittston, Pa.* v. *United States*, 110 F. Supp. 563, 570 (M.D. Pa.)

3. To permit state law and policy to govern the discharge of federal liens "may produce a result inconsistent with the objective of the federal statute" (*Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230), and would create "a serious danger of conflict with the administration of the federal program" (*Pennsylvania* v. *Nelson*, 350 U.S. 497, 505). There are numerous areas of conflict, both actual and potential, between federal and state policies in this area. We indicate some of the more serious:

(a) Under the federal legislation, the United States must be made a party to any proceeding in which a federal lien may be discharged, with all the rights and protections that a party has.[8] Under many state statutes, however (including Pennsylvania),[9] a junior lienor is not an indispensable party to proceedings to eliminate his lien. If it is not a party, the United

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[8] This requirement reflects the settled rule that a "proceeding against property in which the United States has an interest is a suit against the United States," to which the latter is an indispensable party. *United States* v. *Alabama*, 313 U.S. 274, 282; *The Siren*, 7 Wall. 152; *Minnesota* v. *United States*, 305 U.S. 382, 386. A federal tax lien gives the United States an interest in the property to which the lien attaches. *United States* v. *City of Greenville*, 118 F. 2d 963, 966 (C.A. 4); see *In re Pennsylvania Central Brewing Co.*, 135 F. 2d 60, 63 (C.A. 3).

[9] *United States* v. *Cless*, 254 F. 2d 590, 592–593 (C.A. 3).

States is denied the right to raise a number of issues which may vitally affect its interests, including questions as to the validity of the prior mortgage and whether any part of the amount due thereon is junior to the federal lien (cf. *United States* v. *Ball Construction Co.*, 355 U.S. 587).

(b) In a state court proceeding under 28 U.S.C. 2410, the United States can remove to the federal court. There is no right of removal under local foreclosure statutes.

(c) 28 U.S.C. 2410 gives the United States the right to redeem within one year after foreclosure through judicial sale. However, the redemption provisions under state foreclosure laws vary from state to state. In some, junior lienors have no right of redemption; in others, the redemption period is more or less than a year. See Jones, *Mortgages* (8th Ed.), Vol. 2, §§ 1334, 1363; Vol. 3, §§ 1690–1746, 1994, 1996. To apply these differing state redemption provisions to federal liens would frequently produce a direct conflict with the specific federal redemption provision.[10]

Indeed, Pennsylvania law itself treats state tax liens more favorably than federal tax liens. A Pennsylvania statute provides that "The lien of all taxes * * * against any real estate within this Com-

[10] Such a conflict is involved in *United States* v. *John Hancock Mutual Life Insurance Co.*, pending on jurisdictional statement, No. 565, this Term. There the Supreme Court of Kansas held that the United States, as second mortgagee, could not exercise its right under 28 U.S.C. 2410 to redeem within one year property sold at a state foreclosure sale, because Kansas law gives the mortgagor the exclusive right to redeem during that period.

monwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes" (Purdon's Penna. Statutes Annotated, Title 53, Section 7104, Appendix, *infra*, p. 36). While Pennsylvania law permits discharge of a junior lien on realty through foreclosure of a prior mortgage at a sheriff's sale, the Commonwealth's liens may be divested only to the extent permitted by statute. *Liss* v. *Medary Homes*, 388 Pa. 139, 130 A. 2d 137; *Commonwealth* v. *Udziewicz*, 353 Pa. 543, 46 A. 2d 231; *Baird* v. *Moshannon C. M. Co.*, 318 Pa. 63, 178 Atl. 19; *Silverman* v. *Keal*, 135 Pa. Super. 568, 7 A. 2d 57. Thus, under Pennsylvania law the state's tax lien will be discharged through foreclosure only if the state's tax claim is paid in full out of the proceedings. The decision below holds, however, that the same foreclosure proceeding wipes out the federal lien even though the United States receives not a single penny toward payment of its claim.

Finally, we point out that to permit the various and divergent state rules to govern the discharge of federally-created tax liens would be at odds with the "cardinal principle of Congress in its tax scheme" to achieve "uniformity, as far as may be" (*United States* v. *Gilbert Associates*, 345 U.S. 361, 364). Uniformity in this important area of federal tax law can be achieved only by holding, in accordance with what we believe to be the clear intent of Congress, that the federal procedures provide the exclusive method for discharging federal tax liens.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the cause remanded to the district court to grant the relief requested in Paragraph XX (3, 4 and 5) of the complaint.

Respectfully submitted.

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JANUARY 1960.

APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.[1]

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. Sec. 6321)

SEC. 6322. PERIOD OF LIEN.[1]

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. Sec. 6322)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.* Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice

[1] Internal Revenue Code of 1939, Sections 3670 and 3671 (26 U.S.C. 1952 ed., Secs. 3670 and 3671) under which some of the liens herein arise contain substantially the same provisions.

thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. Sec. 6323)

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.* The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

(2) *Bond accepted.* There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured

by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.* Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

(c) *Effect of Certificate of Release or Partial Discharge.* A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 6325)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.* In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secre-

tary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.* All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.* The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.* In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(2n U.S.C. Sec. 7403)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File.—*

(1) *Request for institution of proceedings by United States.* Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the prop-

erty is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.* If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser, may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.* After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.* Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.* All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.
(26 U.S.C. Sec. 7424)

28 U.S.C.:

SEC. 2410 [As amended by the Act of May 24, 1949, c. 139, 63 Stat. 89, Sec. 119] *Actions affecting property on which United States has lien.*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United

States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Title 12:

SEC. 2441. WHEN VENDITIONI EXPONAS MAY ISSUE.

If the inquest shall find that the clear profits, of any real estate levied as aforesaid, will not be sufficient to satisfy, within seven years, the debtor or damages in such execution, and the same shall be approved of by the court, the

plaintiff in such writ may have a writ of venditioni exponas, to sell such real estate, for and towards the satisfaction of his judgment. 1836, June 16, P.L. 755, Sec. 61.

SEC. 2442. TIME FOR SALE.

All sales of real estate by sheriffs and coroners shall be made on or before the return day of the writs respectively, or within six days thereafter. 1845, April 16, P.L. 538, Sec. 2.

Sec. 2443. NOTICE TO BE GIVEN BY HANDBILLS.

But before any sale of real estate shall be made as aforesaid, the officer shall cause so many written or printed handbills to be made, upon parchment or good paper, as the debtor or defendant shall reasonably request, or so many without such request as may be sufficient to give notice of such sale, and of the day and hour when, and the place where the same will be, and what lands or tenements are to be sold, and the place where they lie, which notice shall be given to the defendant, and one of the said papers or parchments shall be fixed by the sheriff, or other officer, upon the premises, and the others of them in the most public places of the county or city, at least ten days before such sale. 1836, June 16, P.L. 755, Sec. 62.

SEC. 2444. ADVERTISEMENT OF SALE; PENALTY FOR NEGLECT.

The officers shall also give notice of every such sale by advertisement describing the real estate to be sold, and the time and place of sale, as aforesaid, in at least two newspapers of general circulation, one of which except in the city and county of Philadelphia, may, and in counties having a population of one hundred and fifty thousand and upwards shall, be a German paper. If, however, there be no newspaper published in such county, then in the newspaper printed nearest thereto, once a week during three successive weeks previous to such sale,

under penalty of fifty dollars to any party aggrieved by such neglect, to be recovered as debts of like amount are recovered: Provided, That nothing herein shall debar any party aggrieved from recovering the damages which he may actually sustain by reason of such neglect. 1836, June 16, P.L. 755, Sec. 63; 1895, July 2, P.L. 420, Sec. 1.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Tital 21:

SEC. 804. SALE OF REAL ESTATE UPON WRIT OF FIERI FACIAS.

No inquisition shall be necessary in connection with the sale of real estate by the sheriff, upon a writ of fieri facias, issued upon a judgment entered upon a bond or promissory note accompanying a mortgage, secured upon the real estate to be sold; and the sheriff may, after giving notice in the manner now provided by law in cases of sales under writs of venditioni exponas, proceed to sell such real estate upon the said writ of fieri facias without any other writ whatever. 1929, May 6, P.L. 1557, Sec. 1; 1951, Sept. 26, P.L. 1450, No. 352, Sec. 1.

Purdon's Penna. Statutes Annotated (Perm. Ed.), Title 53:

SEC. 7104. TAX LIEN DIVESTED BY JUDICIAL SALE.

The lien of all taxes now or hereafter to be levied or assessed against any real estate within this Commonwealth shall be divested by any judicial sale of such land: Provided, The amount of the purchase money shall equal the amount of the said taxes. 1895, May 22, P.L. 111, No. 84, Sec. 1.

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IN THE

Supreme Court of the United States

October Term, 1959

UNITED STATES OF AMERICA,
Petitioner

vs.

WILLIAM J. BROSNAN ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR APPELLEES

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QUESTION PRESENTED

Whether a sheriff's sale of real property in execution of a judgment confessed by the first mortgagee in a state court divests a junior federal tax lien on the property, where the United States was not originally named as a defendant in the confession of judgment proceedings, but was subsequently joined by the state court as a party defendant before the execution sale?

STATUTES INVOLVED

Sections 6321, 6322, 6323(a), 6325(a), (b) and (c), 7403 and 7424 of the Internal Revenue Code of 1954, 28 U.S.C. 2410, and pertinent portions of the Pennsylvania statutes are set forth in the Appendix to appellant's brief, pp. 28-36.

STATEMENT OF HISTORY

The taxpayers involved in this dispute are George H. Parkman, Gladys M. Parkman, his wife and the Mountain Engineering Company, a corporation which they control.

On January 8, 1948 Parkmans purchased a tract of land containing 175 acres in Allegheny County, Pennsylvania from J. D. and Martha M. Berg giving to the Bergs a purchase money mortgage for $45,000.00 with bond of $90,000.00. This real estate was conveyed back and forth from the Parkmans to their corporation on several occasions, always subject to the mortgage. Subsequent to this conveyance from the Bergs to the Parkmans several federal liens were filed against the Parkmans and their corporation which became liens against this land.

On June 7, 1955, following default, the surviving mortgagee confessed judgment on the bond stating a real debt of $43,135.00 with interest from June 1, 1955. A writ of execution was issued out of the Court of Common Pleas of Allegheny County to the Sheriff thereof, but the sale was postponed while said surviving mortgagee petitioned the said court for a rule on the United States to show cause why it should not be joined as an additional defendant at the execution. No answer was filed and 89 days after service of process on the United States, the state court ordered it joined as an additional defendant. During the aforesaid 89 day period William J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest and are the defendants herein.

Statement of History

On January 3, 1956 at sheriff's sale the property was sold to Brosnan and Jacob for costs and taxes of $6,203.00 plus the discharge of the mortgage indebtedness.

On January 3, 1957, by tender of a check to Brosnan only for $6,575.42 the Government attempted to redeem the property under 28 U.S.C. 2410(c). No tender at all was made on Jacob and the tender to Brosnan was refused as being wholly inadequate.

On July 12, 1957 the Government commenced this action in the federal district court seeking alternative relief. First, it sought a foreclosure on its liens pursuant to Section 7403 of the Internal Revenue Code of 1954. Alternatively, it sought a decree that it had properly redeemed the property under 28 U.S.C. 2410(c).

The District Court refused both Government contentions. It held that the Government had not been properly joined as a party defendant in the state court execution, but concluded that the government's liens were divested when the property right on which they were founded was extinguished by the sheriff's sale. It also added that the attempted redemption failed because of inadequacy.

The Court of Appeals affirmed the District Court decision basing its decision on a like theory.

SUMMARY OF ARGUMENT

The court below held that foreclosure of a real estate first mortgage lien, prior in time to federal liens, pursuant to Pennsylvania laws, extinguished the property rights to which the federal liens had attached and as a result the federal liens were divested from said real estate even though the United States was not made a party to the execution under 28 U.S.C. 2410.

There is no dispute that the mortgage in question was both prior in time and prior in right to the federal liens. There is no dispute that the Government's tender for redemption was abortive and, in fact, the Government has admitted this fact and discontinued any argument thereon.

There remains only one basic issue to be decided and that is whether federal junior liens which become encumbrances against real estates by virtue of a property right held therein by a delinquent taxpayer can continue as encumbrances after the taxpayer loses his interest pursuant to the exercise of a right to which the federal lien is admittedly junior.

The lower court's holding that when the property rights of a delinquent taxpayer in real estate have been extinguished by state law procedures, and that thereafter the government has no right of its own in and to the real estate simply because of its having filed its liens of record, is a proper one and should be affirmed.

ARGUMENT

A Federal Tax Lien Which Attaches to a Property Right of a Taxpayer-Owner of Real Estate Is Divested Therefrom When Such Property Right Is Itself Extinguished According to State Law

The court below held that the foreclosure on the real estate mortgage lien pursuant to procedures of the Pennsylvania law extinguished the mortgagor-taxpayer's property right to which the federal lien had attached and consequently the lien itself was divested.

A. The Pennsylvania procedure by a mortgagee for execution on real estate against a delinquent mortgagor.

A review of the Pennsylvania foreclosure procedure laws Pa. Stat. Ann. tit. 21, sec. 804; tit. 12, secs. 2441-2444 disclose that the procedure in the subject case was proper. A writ of fieri facias was issued directing the Sheriff to advertise the sale, levy upon, and sell the premises at auction R. 20-22.

The Laws of Pennsylvania afford an execution-mortgagee a choice of remedies. He may confess judgment on the bond accompanying the mortgage, issue a writ of fieri facias and sell real estate without issuing any other writ Pa. Stat. Ann. tit. 21 sec. 804; or in the alternative, he may institute scire facias proceedings sur mortgage, obtain a

judgment and then sell on a writ of levari facias. In confessing judgment on the bond the mortgagee obtains a judgment "in personam"; whereas, in proceeding by scire facias he obtains a judgment "in rem". See *Cooper vs. Lucas*, 152 Pa. Superior Ct. 655, 33 A. 2d 466, 469. With a judgment "in personam" the mortgagee may proceed against any and all property owned by the mortgagor; whereas, in a proceeding "in rem" he is limited to the property described in the mortgage. In the case at bar it was the absolute legal right of the surviving mortgagee to confess judgment on the bond as was done. She was not limited to a scire facias action. See, *In re Coke's Estate*, 157 Pa. 457, 27 A. 773. The entry of a judgment by confession has the same force and effect as a suit and judgment on a verdict. We refer to the case of *O'Hara vs. Manley*, 140 Pa. Superior Ct. 39, 12 A. 2d 820 at page 822, where the court said:

> "'The confession of judgment is but one of the ways and processes—one "manner"—by which a person is sued. [Confession of a judgment] is a voluntary submission to the jurisdiction of the court, giving by consent and without the service of process, what could otherwise be obtained by summons and complaint, and other formal proceedings. A person who confesses a judgment submits to be sued in that form and manner.' First National Bank v. Garlinghouse, 53 Barb., N.Y., 615, 619."

The purchaser at a Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, sec. 2447, Act of June 16, 1836, P.L. 755. When the execution is on a judgment for a mortgage debt, the judgment

relates back to the time of the mortgage. *West Arch Building & Loan Assn. v. Nichols*, 303 Pa. 434 (1931); *Moore v. Schell*, 99 Pa. Superior Ct. 81 (1930). The effect of the sheriff's sale in the instant case was to extinguish the prior property right or interest of the mortgagor-taxpayer in the subject tract of real estate.

B. Divestiture of a federal tax lien after the extinguishment of the property right upon which such lien was based.

In order to be effective a federal lien must attach or affix itself to a taxpayer's property right. The lien itself cannot operate in a vacuum, but depends on a res, the taxpayer's property right, for its sustenance. The government bases its appeal on the theory that once a federal tax lien attaches to real estate by means of a property right held therein by a taxpayer, then such lien may be divested from that real estate only by relief afforded in the several federal statutes it cites, regardless of the extinguishment of the taxpayer's property right therein under State law. No case is cited to support this novel proposition. The Government thus contends for a new legal concept. It would have the Court give a federal tax lien a quality unknown to any other lien,—the power to resurrect or create some previously non-existing property right to which the lien can attach. This is asking too much even in this "space age".

The correct theory, the one which serves as a solid foundation for the opinion of the court below, is that the existence of the taxpayer's property right is a matter for determination by state law, and, once it has been estab-

lished by state law that such property right no longer exists then, the very basis of the federal lien having been removed, it must logically follow that the lien itself is divested from that property to which the property right formerly attached. That state law should control in such a situation to determine the every existence of such a property right was settled by *Erie Railroad Co. vs. Tompkins*, 304 U.S. 64 (1938). Mr. Justice Brandeis, in an opinion which has become a landmark, stated the following:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . ."

See *United States v. Bess*, 357 U.S. 51, 55 (1958), wherein it was determined that state law must be looked to in order to determine those rights and incidents arising from a federally created lien which are not prescribed by federal law.

In opposition to this theory, the Government relies upon the case of *Metropolitan Life Insurance Co. vs. United States*, 107 F. 2d 311 (6 Cir. 1939). On the surface the decision in that case would appear favorable to the

Government's contention, but under close examination a basic fallacy is evident in the opinion. For adverse comment thereon see 53 Harv. L. R. 894 and 49 Yale L. J. 1106. At pages 1108 and 1109 of the latter the fallacy is pinpointed. The majority failed to distinguish between release or discharge of a specific lien and adjudicating a specific lien to be non-existent. In a vigorous dissent in the *Metropolitan* case Circuit Judge Arant stated in part:

> "If any interest of the tax debtor survived the exercise of the power of sale the conclusion could be accepted. But the interest of the tax debtor to which the lien had attached was extinguished when the property was sold for less than the claim of the mortgagee. Let us suppose a tax debtor owned an estate in fee subject to a condition subsequent and after a tax lien attached, the condition occurred which terminated his estate. All his interest having been extinguished, is the tax lien thereafter existent and enforceable? Unless the Congress has power to take the property of one person to pay the tax debt of another this question must be answered in the negative."

In the case of *U. S. v. Boyd*, infra, a case of similar facts, the court, perceiving the problem herein presented stated that it is a consequence of the prior lien and the rights of enforcement granted by it which destroy the junior liens, federal or otherwise, come from its very nature of being superior and not from some later determination to the same effect.

In the case at bar the Government commenced its action, inter alia, under the provisions of Section 7403, Internal Revenue Code 1954 requesting a sale of property.

In accordance with that Section a sale may be decreed only "... where a claim or interest of the United States ... is established". Following the theory of the *Metropolitan* case dissent and of the *Boyd* case majority there remains no interest in the United States on its junior liens after the sale on execution following confession of judgment on a superior mortgage lien.

The Government argues that only by use of federal procedures adopted by Congress may federal liens be "extinguished". Throughout the trial, the appeal to the circuit court and in its present brief the Government has used the words "extinguished", "abolished" and "wiped out" to define several separate and distinct legal consequences. Removal of a lien by payment in full or by settlement, removal of it by release, and mere divestiture of it from one of several parcels of land of a taxpayer, have all been referred to as "extinguishment" of the lien. The liens in question might be said to be extinguished so far as they relate to the subject property, but to say that they are "extinguished", "abolished" and "wiped out" generally is untrue and misleading. Even today, the liens on which the Government based its lower court action are open on the records in the Prothonotary's Office of Allegheny County, Pa. where originally filed. They are still good and valid liens against other property owned or controlled by the taxpayers. By the decision of the court below it was held that these liens had simply been divested by the sheriff sale from this one particular tract of real estate, but certainly their legality in all other respects against the taxpayers remains unchanged.

C. Rights and remedies under Sections 2410 and 7403.

The Government has limited its appeal to its right of foreclosure under Section 7403 of the Internal Revenue Code of 1954. By this section the Attorney General is authorized to institute an action "to enforce the lien of the United States" upon "any property, of whatsoever nature" of a delinquent taxpayer, or upon property "in which he has any right, title or interest". Again, this action is directed against a "property right" the very existence of which must be determined by state law. *Erie Railroad Co. v. Tompkins, supra.* In the instant case, Pennsylvania law dictates that after a sheriff's sale the foreclosed mortgagor-taxpayer has no right, title or interest remaining in the foreclosed real estate. Since it would be an unconstitutional invasion of state rights to usurp the state's prerogative to determine such rights by its own laws, the Government's contention that the federal scheme is so designed, must be erroneous.

There is no disagreement with the Government's contention that a federal plan for extinguishment and discharge of federal tax liens exists. It is submitted, however, that such matters have no application in the subject case. Divesting a lien differs from extinguishing it. In this regard reference is made to the opinions in this case of the courts below: of the District Court at 164 F. Supp. 357 and of the Circuit Court at 264 F. 2d 762.

The Government indulges in a search of the House Committee (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1-2) reports on 28 U.S.C. 2410 to support its conclusion that by necessary implication federal tax liens can never be eliminated (divested) through state court proceedings.

Nowhere in these reports is this sweeping statement made and nothing contained in these reports would indicate that the federal procedure desired was anything but a statute whereby the Government would give its consent to be joined or named as a defendant in an execution proceeding in a state whose laws require that all junior lienors must be named or joined therein before clear title can be given to the execution sale purchaser. *U. S. v. Cless*, 254 F. 2d 590. *U. S. v. Boyd*, 246 F. 2d 477 (5 Cir. 1957), cert. den. 355 U.S. 899. Pennsylvania law requires no such joinder of junior lienors. Pa. Stat. Ann. tit. 12, secs. 2441-2444, Act of June 16, 1836, P.L. 755.

The Government credits Congress with the passage of 28 U.S.C. 2410 for the purpose of establishing the exclusive procedure for discharge of federal liens for the reason that there existed "no method whereby the [federal] lien for taxes may be discharged without payment". This statement when read in the light of the Act of Congress passed pursuant thereto is entirely without foundation. This statement must be limited by additional facts relative to the position of execution creditors in the several states of the union. In some states equity actions must be commenced by the execution creditor wherein all junior lienors are named or joined as defendants. To name the sovereign without its consent being impossible, legislation was needed to equalize the rights of those in such states with those in states having laws similar to Pennsylvania. Read in this light, the above quotation portends a remedy for an entirely different problem.

In its decision, the district court disagreed with the contention that the Government had been properly joined under 28 U.S.C. 2410 (R. 27) but rested its decision on a

more basic concept. Nevertheless, the procedure regarding this phase of the case does merit close consideration.

At the trial of this case the Government counsel contended that there was no compliance with Section 2410 procedure because this sheriff's sale was not a "judicial sale". He had no argument against the notice given the Government or its joinder in the execution but stated (R. 53):

> "Mr. Coe: We admit that the service requirement was met, we admit the petition was served upon us and contains the interest of the United States with particularity, which is one of the requirements. But the third requirement of the statute is that there be a judicial sale to divest the Federal liens. And we maintain there has been no judicial sale."

Then again (R. 56) we find the following:

> "The Court: Of course, what Mr. Coe is hanging his hat on now is the words 'judicial sale'. Is that right?
>
> Mr. Coe: That is right."

All execution process in this case is governed by Pennsylvania law. All sales of real and personal property made by the sheriff in pursuance to his official duties are "judicial sales".

To put the matter completely at rest, we have but to refer to the Act of the Pennsylvania Legislature in defining this term. See Pa. Stat. Ann. tit. 46, sec. 601, Item 57, which states:

> "A judicial sale is a sale conducted by an officer or person authorized for the purpose by some competent tribunal."

In the instant case the sale was duly authorized in a writ directed to the sheriff. The authority for the writ eminated from the Common Pleas Court. This has been the long established practice in Pennsylvania. Under the law of Pennsylvania the sheriff in making such sales is required to advertise, post the premises, describe the property, hold an open auction for bidding and accepting bids, etc., etc. That is exactly what was done in the case at bar. In the case of *Pennsylvania Company vs. Broad Street Hospital*, 354 Pa. 123, 47 A. 2d 281 at page 282 the Supreme Court of Pennsylvania in discussing sheriff sales said:

> "It is elementary that all judicial sales must be open to free and fair competition."

Under the circumstances, therefore, it is contended that the sale in question was a "judicial sale", that the Government is now estopped to question the validity of that sale and that it is also estopped to question the fact that it was properly joined as a party under Section 2410 aforesaid. The doctrine of estoppel is invoked because the Government by its acts recognized and ratified the sale and proceeded under that portion of Section 2410 (c) which allows it one year in which to redeem by attempting a redemption (R. 41). Furthermore, since the United States failed in its effort to redeem within one year from the sheriff's sale, it was within the province of the lower court to have entered judgment for the defendants on this narrower ground if it had seen fit to do so.

Although the Government sought alternative relief in its original action in the district court claiming that it had made a sufficient tender under Section 2410 in order to

redeem this property it has abandoned this claim on appeal. Clearly the Government's tender of $6,575.42 was inadequate and insufficient. *Collins v. Riggs*, 81 U.S. 491. Therefore, in addition to the reasoning of the decisions of the district and circuit courts, the Government should be precluded from exercising any rights under Section 7403, having previously failed in its right of redemption under Section 2410.

In its argument (pages 9, 10 and 11 of its brief) the Government asserts a proposition that is manifestly improper. It attempts to argue on appeal, for the first time, a matter that was not before the lower court, namely, the market value of the subject real estate. A review of the testimony produced in this case shows that there was not a scintilla of evidence offered or attempted to be offered by the Government concerning the value of this real estate. Therefore, any mention of a "windfall" or any "excess" over the mortgage debt is unwarranted and clearly out of place. See *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954), where the Court held:

> "Of course we will not undertake to review what the Court below did not decide".

Again in the case of *Commissioner of Internal Revenue v. Gregory Run Coal Co.*, 212 F. 2d 52 the Court said:

> "The details underlying this contention are not clearly set forth on the record, or in the briefs of the parties and the point is raised for the first time on this appeal. Ordinarily an appellate court does not give considerations to issues not raised below. Hormel v. Helvering, 312 U.S. 552, 556."

To summarize, the following precepts are asserted as controlling the real issues in the case at bar:

(a) that property rights are created by state law: *Morgan v. Commissioner*, 309 U.S. 78, 80;

(b) that no attribute of sovereignty of the United States can increase the interest of a property owner. *Trust Co. of Texas v. United States*, 3 F. Supp. 638;

(c) that state law establishes the status of mortgages and other liens on real property. *Erie Railroad Co. v. Tompkins*, supra;

(d) that when real estate is encumbered first, by a mortgage and then by other junior liens, foreclosure proceedings by sheriff's sale on the mortgage and the resulting change in property rights are governed by state law. *Erie Railroad Co. v. Tompkins*, supra, *United States v. Bess*, supra;

(e) that in such instances junior federal tax liens, as such, are not extinguished, abolished or wiped out generally by operation of such state law, the taxpayer's liability thereon remains unaffected, but the government must look to other sources for payment as its liens are divested from the real property so executed upon. *United States v. Boyd*, supra. *United States v. Cless*, supra.

CONCLUSION

In view of the foregoing, counsel for appellees respectfully represent that the appeal in the instant case should be denied and the judgment of the Circuit Court affirmed.

Respectfully submitted,

WILLIAM L. JACOB,
WILLIAM L. JACOB, JR.,
Attorneys for Appellees.

January, 1960.

No. 183

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In the Supreme Court of the United States

OCTOBER TERM 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM 1959

No. .....

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to United States Court of Appeals for the Ninth Circuit

To: *The Honorable Earl Warren, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States*

Petitioner BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, respectfully prays that a writ of certiorari issue to review the decision and decree of the Court of Appeals for the Ninth Circuit entered in the above cause, No. 16034 on the docket of said court, on Feb. 2, 1959; petition for rehearing denied May 1, 1959.

Opinions below

There were two opinions in the United States Court of Appeals for the Ninth Circuit. Copies are appended hereto as Exhibit A and are reported as *United States v. Bank of America N.T. & S.A.*, 265 F.2d 862. There was no opinion in the District Court.

Jurisdiction

(i) The dates of the judgments or decrees sought to be reviewed and the times of their entries are as follows:

Original opinion and judgment filed February 2, 1959. Supplemental opinion and order denying petition for rehearing filed May 1, 1959.

(ii) The statutory provisions believed to confer upon this Court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c); also Rule 22 of the Rules of this Court.

The Questions Presented for Review

The sole questions presented for review are, when there is a private lien on real and personal property, and an inferior tax lien is subsequently created in favor of the United States (1) Does the exercise of a right of private sale by the holder of the first lien free the property from the inferior tax lien? (2) Does the United States have a one year right of redemption after the exercise of the right of private sale?

Statutes Involved

The principal statutes involved are 26 U.S.C. 6321 and 28 U.S.C. 2410, quoted in Exhibit B hereto.

Statement of the Case

On February 13, 1953, Sierra Title Company, a California corporation, borrowed certain sums from Petitioner and secured the borrowing by the execution and delivery

to Petitioner of a deed of trust and chattel mortgage on certain real and personal property owned by the borrower (Transcript of Record[1] pages 20, 21). Title to the property was subsequently conveyed to Sierra Wood Products Corporation, subject to the deed of trust and chattel mortgage. Thereafter on February 19, 1954, there was filed in the Office of the County Recorder of Calaveras County, California, where the real and personal property in question were located, a notice of federal tax lien as to Sierra Wood Products Corporation (R 22).

Sierra Wood Products Corporation thereafter defaulted as to the indebtedness due Petitioner and Petitioner, in full compliance with California law and with the terms of the deed of trust and chattel mortgage, sold the real and personal property at a public auction, at which Petitioner became the purchaser. Petitioner gave all notices required by California law, but did not give a specific notice to the United States Government, although the latter could have obtained specific notice by filing a request for notice with the County Recorder of Calaveras County as provided for in Section 2924(b) of the California Civil Code (R 23).

After the sale Petitioner filed an action in the California Superior Court, Calaveras County, to quiet title to the property (R 4). Respondent thereupon petitioned for removal of the action to the United States District Court (R 3), where Petitioner moved for summary judgment, which was granted (R 57 and 58). From this judgment Respondent appealed to the United States Court of Appeals for the Ninth Circuit where the decision was reversed and summary judgment was granted to Respondent (R 66).

The California Constitution vested jurisdiction as to the quiet title action in the Superior Court of Calaveras County.

1. Hereinafter referred to as (R).

By 28 U.S.C. 2410 the United States consented to suit in the State Court. The District Court acquired derivative jurisdiction upon removal pursuant to 28 U.S.C. 1444. (R 69).

Argument

Certiorari should be granted because there exists a direct conflict in the circuits as to the first question presented in this case. The Fifth and Third Circuits have held that the exercise of a right of private sale under a prior private lien in accordance with State law frees the property from the federal tax lien. *United States v. Boyd*, 246 F.2d 477 (C.A. 5th 1957), cert. den. 355 U.S. 889, and *United States v. Brosnan*, 264 F.2d 762, (C.A. 3d 1959). Directly in conflict and holding the opposite are this case and *Metropolitan Life Ins. Co. v. United States*, 107 F.2d 311 (C.A. 6th 1939), cert. den. 310 U.S. 630.[2]

A further reason for granting a writ is that both the above question and the related question as to the right of redemption constitute important questions of federal law which have not been but should be settled by this court. It is certainly important that the rights of the Government and of the taxpayers should be clear and certain.

The result of this case and of the *Metropolitan* case is that both the holder of the private lien and the United States Government are confronted with the burden of a judicial action which can be of no real benefit to either party, can only add to the burden of the federal courts and without rhyme or reason increase the cost and delay for all concerned, including the Government.

The position of Petitioner is that the decisions of the District Court in this case and the Courts of Appeal in the

2. In the *Metropolitan* case there was a dissent which in the opinion of Petitioner represents the correct view.

Rood and *Brosnan* cases were correct. When a debtor has given a deed of trust he has diminshed his property rights and the property involved becomes subject to defeasance in the manner prescribed in the deed of trust. It is upon this diminished bundle of property rights that the subsequent federal tax lien attaches. When the right of private sale is exercised the debtor has simply lost his property; the tax lien is not eliminated or released, but continues as to any other property of the debtor. What has happened is that the property subject to the deed of trust and tax lien has ceased to be the property of the debtor. The situation is the same as if the federal tax lien had attached to a life estate and the debtor had died before any proceedings to enforce the lien had been completed. It should be emphasized that the exercise of the right of private sale is fully authorized under the State laws which create and limit the property rights of the debtor. *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940), *United States v. Bess*, 357 U.S. 51, 55.

In the absence of any statute specifically providing otherwise, it seems both logical and correct that in this area the Government and the individual lienholder should be on the same footing. In the House Reports dealing with the legislation pertaining to filing of notice of tax liens the following appears:

> "There is no reason why the Government should not occupy the same position with reference to liens on property as does the individual."
>
> H.R. Rep. No. 1018, 62d Cong. 2d Sess. Page 2 (1912)

The second question, pertaining to the right of redemption specified in Subparagraph (c) of 28 U.S.C. 2410, should not affect the answer to the first question, because if preservation of the right of redemption is required this can be accomplished under the statute, while also giving the de-

sired effect to the private sale. This question of redemption was not considered in any detail in the *Brosnan*, *Boyd* or *Metropolitan* cases. However, the Court of Appeals in this case, particularly in the Supplemental Opinion, stressed its conclusion that the procedure followed by Petitioner was improper because the Government would be denied this right of redemption.

28 U.S.C. 2410 does not specifically state that a right of redemption is a condition to the filing of suit against the United States. Subsection (a) refers to mortgages upon real or personal property. The first sentence of Subsection (c) states that a *judicial sale* in any such action shall have the same effect as may be provided under local law. This would be sufficient to grant the Government a right of redemption in those states in which such a right is provided for under the local law as to judicial sales. This first sentence certainly refers to both real and personal property. The second sentence states a fundamental rule and the use of the word "sale" without modification would appear to include both judicial and nonjudicial sales relating to both real and personal property. The third sentence dealing with the right of redemption again uses the word "sale" without modification, but is limited specifically to real property. Each sentence appears to be complete in itself and not interdependent either with any other sentence or with Subsection (a). In view of the fact that in the first sentence a "judicial sale" is specifically referred to and in the second two sentences the word "sale" only is referred to, the statute is susceptible of the construction that the Government would have the right of redemption after any sale, whether judicial or not. This interpretation would justify the implication in the *Boyd* and *Brosnan* cases that the Government had a right of redemption, and would give meaning to all

portions of the statute. Certainly from the standpoint of the Government a statutory provision which is for the protection of the Government should be broadly rather than narrowly interpreted. In any event this is an important question of federal law which has not been but should be settled by this Court.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated: San Francisco, California, July 2, 1959.

Respectfully submitted,

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Counsel for Petitioner.

(Appendix Follows)

Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* vs. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, *Appellee.*	No. 16,034 Feb. 2, 1959

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April 9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual notice of the sale was

given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1]

On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States consented to be sued in the State Court.[3] The District Court

[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided * * *)

* * *

"* * * all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. * * * " (Article VI, Sec. 5).

[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit . . . in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410(a)).

acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign immunity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hearing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon

---

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1444).

[5] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842; Seattle Association of Credit Men, 9 Cir. 1957, 240 F. 2d 906.

[6] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

[8] 26 U.S.C.A. § 7403, which provides for civil actions in a district court of the United States to enforce federal tax liens.

or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b) and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real property, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.[9]

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int.

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[9]The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1026; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

[10]Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues that subsection (c) relates only to foreclosure actions and not to quiet title actions.

The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest penalty and costs) "shall be a lien

[11] Section 2410 (c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."[12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by the United States."[13] And, as this Court said in Bank of Nevada v. United States, 1957, 251 F. 2d 820, 824, cert. den. 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, "the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. Metropolitan Life Ins. Co. vs. United States, 6 Cir. 1939, 107 F. 2d 311, cert. den. 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered

[12]United States v. Bess, 357 U. S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

[13]Id. at 56; 57. See also Fidelity & Deposit Co. v. New York City Housing Auth. 2 Cir. 1957, 241 F. 2d 142, 144.

[14]Carpenter v. Smallpage, 220 Cal. 129, 29 P. 2d 841 (1934); Stifeiff v. Darlington, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder." (107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens on real estate may be released, but also to limit the right to sue therefore and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute . . . , under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in United States v. Boyd, 1957, 246 F. 2d 477, cert. den. 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In United States v. Boyd, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it

[15]United States v. Kensington Shipyard & Drydock Corp., 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclo....., it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to under-

[16]The dissenting opinion in the Metropolitan Life case succinctly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject to destruction by exercise of the power of sale . . . The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also United States v. Cless, 3 Cir. 1958, 254 F. 2d 590; United States v. Brosnan, W.D. Pa. 1958, 164 F. Supp. 357.

stand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410 (c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an application with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

(Endorsed:) Opinion. Filed Feb. 2, 1959.

Paul P. O'Brien, Clerk.

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[17]The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

On Petition by Appellee for Rehearing

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and particularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States".[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the United States and in the manner prescribed by Congress.

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(*c*) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law,—a wholly illogical result in those states, for ex-

[1]United States v. Alabama, 1941, 313 U.S. 274, 282, 61 S.Ct. 1101, 85 L.Ed. 1327. See also The Siren, 1868, 7 Wall. 152, 19 L.Ed. 129; Carr v. United States, 1879, 98 U.S. 433, 25 L.Ed. 209, 211; State of Minnesota v. United States, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F.2d 311, cert. denied 310 U.S. 630, 60 S.Ct. 978, 84 L.Ed. 1400.

[2]The Third Circuit reached a contrary conclusion in United States v. Cless, 1958, 254 F.2d 590, and United States v. Brosnan, 1959, ... F.2d .....

ample, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or valueless government liens,[3] but where the lien, though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale. . .

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of

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[3]Senate Report No. 1646, 77th Cong. 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. Welch v. Hamilton (S.D. Calif.) 33 F. (2d) 224, and U.S. v. Turner (C.C.A. 8), 47 F. (2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgages have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

federal tax liens. In our opinion this question must be answered in the negative. A valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

(Endorsed:) Opinion on Petition for Rehearing. Filed May 1, 1959.

Paul P. O'Brien, Clerk.

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[4]Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

Exhibit B

26 U.S.C. § 6321. Lien for Taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

28 U.S.C. § 2410. Actions affecting property on which United States has lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien. (As the section read prior to the 1958 Amendment.)

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States

at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same

extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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SUPREME COURT, U. S.

FILED

JUL 23 1959

JAMES R. BROWNING, Clerk

No. 128

Supreme Court of the United States

OCTOBER TERM, 1959

[redacted] NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER,

vs.

[redacted] STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The question in this case is whether a junior federal tax lien may be extinguished by a sale of the property by a mortgagee under a contractual power of foreclosure and sale contained in the mortgage. Substantially the same question is presented in *United States* v. *Brosnan*, No. 137, this Term, decided by the Third Circuit, in which the Government filed a petition for certiorari on June 23, 1959. The court below expressly recognized (Pet. App. 11) that

its conclusion here was contrary to that reached by the Third Circuit. The court also recognized (Pet. App. 6-9) a conflict with the decision of the Fifth Circuit in *United States* v. *Boyd*, 246 F.2d 477, certiorari denied, 355 U.S. 889. The decision below is, however, in accord with that of the Sixth Circuit in *Metropolitan Life Ins. Co.* v. *United States*, 107 F. 2d 311, certiorari denied, 310 U.S. 630.[1]

The fact that this case, as well as the *Boyd* and *Metropolitan Life Ins. Co.* cases, involves a power of sale contained in a mortgage while the *Brosnan* case involves a sale in execution of a confessed judgment does not appear to have significance. The legal principles involved are identical, and the essential conflict in the lower courts should be resolved. The question presented vitally affects many property transactions throughout the country and is important to the uniform collection of taxes. Accordingly, the Government does not oppose certiorari.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

JULY, 1959

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[1] See also the opinion of the Third Circuit in the *Brosnan* case. (Petition in No. 137, this Term, p. 15.)

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner's Brief

OPINIONS BELOW

There is no reported opinion of the District Court. The memorandum decision of the District Court appears in the record at pages 57 and 58. The original opinion of the Court of Appeals is reported as *United States v. Bank of America N. T. & S. A.*, 265 F.2d 862 (9th Cir. 1959). A supplemental opinion appears at page 868.

JURISDICTION

The original opinion (R. 66-74) and the judgment based thereon were filed and entered February 2, 1959 (R. 75).

The supplemental opinion (R. 76-78) was filed May 1, 1959. The petition for a writ of certiorari was filed July 6, 1959, and was granted on October 12, 1959 (R. 79).

This Court has jurisdiction under the provisions of 28 U.S.C. (1952 ed.) §§ 1254(1) and 2101(c) and Rule 22 of the Rules of this Court.

STATUTES INVOLVED

The principal statutes involved (which are printed in Appendix A hereto) are Sections 3670, 3671 and 3672, Internal Revenue Code of 1939 (now Sections 6321, 6322 and 6323, Internal Revenue Code of 1954) and 28 U.S.C. (1952 ed.) § 2410.

QUESTIONS PRESENTED FOR REVIEW

(1) Does the purchaser of land and chattels at a foreclosure sale, held pursuant to power of sale in a first deed of trust and chattel mortgages, acquire title free of subordinate tax liens of the United States?

(2) May such a purchaser establish his clear title by a quiet title suit against the United States?

(3) Does the United States have a right of redemption after a foreclosure pursuant to a contractual power of sale?

STATEMENT OF THE CASE

On February 13, 1953, Sierra Title Company, a California corporation, borrowed money from Petitioner, Bank of America (hereinafter called "Bank"), and secured its borrowing by a deed of trust and a chattel mortgage covering certain land and chattels owned by the borrower (R. 20-21). On April 9, 1953, Sierra Wood Products Cor-

poration, another California corporation, borrowed money from Bank and secured its borrowing by a chattel mortgage covering certain other chattels owned by it (R. 21). On September 28, 1953, Sierra Title Company transferred its equity in the property covered by its deed of trust and chattel mortgage to Sierra Wood Products Corporation (R. 21). Thereafter various taxes were assessed by the United States against Sierra Wood Products Corporation (hereinafter called "Taxpayer"). Notices of tax lien were filed, and all or portions of such taxes remain unpaid (R. 22).

Taxpayer thereafter defaulted on its indebtedness to Bank, and Bank, in full compliance with California law and with the terms of the deed of trust and chattel mortgages, caused the land and chattels to be sold at public auction in accordance with its contract powers of sale and became the purchaser at that sale. Bank gave all notices required by California law but did not give any special notice to the Government, which had failed to request special notice under the provisions of Cal. Civ. Code § 2924b (R. 22-23).

Thereafter, Bank filed an action in the California Superior Court for Calaveras County to quiet title to the land and chattels (R. 4-8). The Government petitioned for removal of the action to the United States District Court (R. 3) where Bank's motion for summary judgment was granted (R. 57-58). The Government appealed to the Court of Appeals (R. 61) where the judgment of the District Court was reversed (R. 75). Bank's petition for rehearing was denied by the Court of Appeals on May 1, 1959 (R. 75, 76), and its petition for certiorari was granted by this Court on October 12, 1959 (R. 79).

SUMMARY OF ARGUMENT

The tax liens attached only to property and rights to property belonging to Taxpayer. Neither at the time the tax liens arose, nor at any time thereafter, did Taxpayer own more than the defeasible rights remaining after the deed of trust and chattel mortgages had been given to Bank. The rights of Taxpayer were subject to absolute termination upon foreclosure pursuant to the powers of sale held by Bank. Bank acquired a clear title by purchasing at the foreclosure sale.

The Government's consent to be sued in a quiet title action is not conditioned on existence of a right of redemption, although, if a right of redemption on the part of the Government were crucial, 28 U.S.C. (1952 ed.) § 2410 could be construed to provide a right of redemption following a nonjudicial foreclosure sale. Even this interpretation would require reversal of the decision below.

ARGUMENT

Point I—The Government's Subordinate Tax Lien Attached Only to Defeasible Rights to Property of the Taxpayer Which Thereafter Ceased to Exist.

The Government's tax liens arose under the following statutory provision:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount * * * shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." 1939 Internal Revenue Code § 3670.

Since the Government's tax liens are statutory, their scope and effect must be determined by the statute and the decisions interpreting it. *Mackenzie v. United States*, 109 F. 2d 540 (9th Cir. 1940). The Government's tax liens are

expressly limited to property and rights to property belonging to the taxpayer. By virtue of the foreclosure sale, the taxpayer no longer has either "property" or "rights to property" in the land and chattels affected by this action.

A tax lien statute creates no property or rights to property but merely attaches consequences to such rights which are created under state law. *United States v. Bess*, 357 U.S. 51, 55. What constitutes property or rights to property to which the Government's tax liens can attach must be determined by reference to state law. *Metropolitan Life Ins. Co. v. United States*, 107 F.2d 311, 313 (6th Cir. 1939) *cert. denied* 310 U.S. 630. This Court defined the operating relationship between state law and federal revenue acts in *Morgan v. Commissioner*, 309 U.S. 78, 80: "State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."

California law is clear that a sale pursuant to a power of sale effectively terminates the defeasible rights of the trustor under a deed of trust or the mortgagor under a mortgage and incidentally all rights of any subordinate lienholder. Title may be quieted in a purchaser at a foreclosure sale conducted under such a power of sale. *Carpenter v. Smallpage*, 220 Cal. 129, 29 P.2d 841 (1934). The exercise of the power of sale in a deed of trust passes a title absolute as to all subordinate claimants. *Streiff v. Darlington*, 9 Cal. 2d 42, 68 P.2d 728 (1937). The title acquired by a purchaser at such a sale is equivalent to the title acquired by a purchaser at a foreclosure sale conducted pursuant to a court decree (*Fighiera v. Radis*, 180 Cal. 660, 664, 182 Pac. 418 (1919)) and such purchaser obtains all incidents of title as well as title itself. *Central Sav. Bank of Oakland v. Lake*, 201 Cal. 438, 255 Pac. 1097 (1927) *cert. denied* 275 U.S. 571. The rights of a chattel

mortgagor and those claiming under him are similarly terminated upon the exercise of a power of sale because the statute authorizing powers of sale (Cal. Civ. Code § 2932) is equally applicable. *Dohrman v. Durston*, 90 Cal. App. 2d 236, 202 P.2d 607 (1949); *Elmore Jameson Co. v. Smith*, 34 Cal. App. 2d 609, 93 P.2d 1063 (1939).

The basic proposition urged by Bank is that the Government's tax liens attach only to what a taxpayer has. For example, tax liens would attach to a tenant taxpayer's interest in a lease, but when the lease expired the owner of the property subject to the lease would hold it free of any lien of the Government. The Government has expressly recognized the validity of this analysis as to options. Rev. Rul. 54-154 (1954—1 Cum. Bul. 277) is as follows:

> "Federal tax liens attach to property only to the extent of the delinquent taxpayer's interest therein. Where a taxpayer has only an option to purchase real property at the time the Federal tax lien arises, the lien attaches to the option and not to the real estate. Where his rights under the option are terminable, the Government's rights, by virtue of its lien upon the taxpayer's interest, are likewise terminable, being no greater than those of the taxpayer. Accordingly, when the taxpayer's rights under an option terminate after the Federal tax lien has arisen, the rights of the United States in the option also terminate, since there is no longer any property in the option to which a lien can attach."

This analysis seems to have been rejected only by the Court of Appeals in this case. This analysis is in accord with *United States v. Brosnan*, 264 F.2d 762 (3rd Cir. 1959), *cert. granted*, 26 U.S.L. Week 3108; *United States v. Boyd*, 246 F.2d 477 (5th Cir. 1957) *cert. denied*, 355 U.S. 889; *Fidelity & Deposit Co. v. New York City Housing Authority*, 241 F.2d 142 (2nd Cir. 1957); *Metropolitan Life Ins. Co. v.*

United States, 107 F.2d 311 (6th Cir. 1939) (dissenting opinion; the majority did not reach this question) *cert. denied* 310 U.S. 630; 49 Yale L. J. 1106, 1110-1112; 53 Harv. L. Rev. 888, 889; 33 Va. L. Rev. 13, 32-38. It is significant that a nonjudicial foreclosure sale passes title free of subordinate tax liens of the State of California. *Wayland v. State of California*, 161 Cal. App. 2d 679, 326 P.2d 954 (1958).

This is an action to quiet title. Bank did not sue to remove an existing lien or claim of the Government, but rather to obtain a judgment establishing an existing fact, namely, that the Government has no lien on the land and chattels affected by the action. The Court of Appeals held for the Government. The Court of Appeals reasoned that the right of redemption, mentioned in 28 U.S.C. (1952 ed.) § 2410(c), is a condition to the Government's consent to be sued and no right of redemption is available following a nonjudicial foreclosure; therefore, the Government has not consented to be sued in this quiet title suit. Indirectly this is a holding that the foreclosure sale was ineffectual to pass clear title to Bank as purchaser. In its supplemental opinion the Court of Appeals expressly stated that the sole issue presented was whether the sale under the power contained in the deed of trust and chattel mortgages gave Bank a clear title and answered the question in the negative.

This conclusion finds little, if any, support in the *Metropolitan* case because, as pointed out in the *Brosnan* case, the proceeding in the *Metropolitan* case was one to divest an existing lien of the United States. A suit to quiet title could not be maintained at that time because consent to sue the United States in quiet title suits was first granted by the Act of December 2, 1942, c. 656, 56 Stat. 1026, subsequent to the decision in the *Metropolitan* case. In the *Brosnan* case, in the *Boyd* case, and in this case the more basic

question (whether title passed free of any lien of the United States) was decided. The conclusion of the court below is squarely opposed to the decision of the *Brosnan* case, a fact recognized by both courts, and is necessarily in conflict with the decision in the *Boyd* case.

The Government's position seems inconsistent with the evident intent of Congress to protect fully the rights of mortgagees, pledgees, purchasers and judgment creditors who acquire their rights against property of a taxpayer before notices of federal tax liens are recorded. Section 3672 of the Internal Revenue Code of 1939 (now Section 6323, Internal Revenue Code of 1954) provided that tax liens of the United States "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" in the prescribed manner. These provisions were enacted as a direct result of the decision in *United States v. Snyder*, 149 U.S. 210. *United States v. Gilbert Associates*, 345 U.S. 361, 363. The *Snyder* case held that the United States was not bound by state recording laws and that even as against a purchaser without notice the prior tax liens of the United States were enforceable.

Although Section 3672 is intended to protect mortgagees, purchasers, pledgees and judgment creditors who become such after the Government acquires tax liens, the protection extends to mortgagees, purchasers, pledgees, and judgment creditors who become such before a notice of tax lien is filed. This necessarily includes all those cases in which the favored status is acquired before the tax is assessed and the lien arises. Under the decision of the court below the Government's tax liens are not only valid as to Bank, the express provision of the statute to the contrary notwithstanding, but Bank's deed of trust and

chattel mortgages, which Congress undertook to protect, are partially invalidated.

The result reached by the Court of Appeals in this case is both unsatisfactory and unfair. It deprives Bank of the valuable right of foreclosure by power of sale and therefore of the most expeditious and economical means of realizing on its security. It gives to the Government greater rights than Taxpayer itself had. The additional rights which the Government acquires under the decision are, we believe, of slight, if any, value. The rights taken from Bank are substantial. The result is entirely without support in law.

A contrary result would be fair to both the Government and prior mortgagees. A mortgagee's rights would be neither increased nor decreased by the incidence of federal tax liens. The Government's federal tax liens would reach fully the rights to property held by taxpayers but would not exceed those rights. Mortgagees would be permitted to foreclose by the exercise of powers of sale and this would be of benefit to both mortgagees and the Government because this procedure is less costly and leads to a quicker sale. After all, in nearly all cases of this nature the taxpayer is in a distressed condition. Interest is running on both the claim of the Government and the claim of the mortgagee as the first lien holder. A taxpayer has only so much property out of which to pay all claims. The more immediate the sale, the greater the amount that can be realized for the payment of those claims. Allowing a mortgagee to exercise its power of sale is obviously the more satisfactory method from the standpoint of a taxpayer also, since the sooner his obligations can be settled the better for all concerned.

Point II—A Quiet Title Suit Against the United States (with or without a Right of Redemption) Is Expressly Authorized by 28 U.S.C. (1952 ed.) § 2410.

The conclusion of the Court of Appeals, that Bank may not have title to the land and chattels quieted because the Government does not have a right of redemption after a nonjudicial foreclosure, is contrary to the evident purpose of Congress. S. Rep. No. 1646, 77th Cong., 2d Sess. (1942), (which accompanied H.R. 5578 amending Section 2410) quotes a letter from Honorable Robert H. Jackson, then Attorney General, to Honorable Hatton W. Summers, then Chairman of the Committee on the Judiciary. After stating that the bill would extend the consent of the United States to be sued to include foreclosure actions affecting personal property, and expressing the view that no distinction should be made between real and personal property for purposes of consent to be sued, Attorney General Jackson's letter continues:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. *Welch v. Hamilton* (S.D. Calif.) 33 F.(2d) 224, and *U. S. v. Turner* (C.C.A. 8), 47 F.(2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. *In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens.* Accordingly, I suggest that the bill be amended by inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill." (Emphasis supplied.)

The bill was reported favorably with the changes recommended by the Attorney General and was enacted with those changes.

Subsection (e) was already a part of Section 2410 when provision was made to permit the United States to be sued in quiet title actions. The change was accomplished by insertion of the words "to quiet title or" in subsection (a), as suggested by the Attorney General. Although mortgages and liens on real property could be foreclosed against the United States, the Attorney General stated there should be a procedure for clearing title where that had not been accomplished in the way already permitted. The Attorney General expressed the view that justice and fair dealing required such an alternative method of clearing real estate titles of liens of the United States. There is nothing in the legislative history to support the conclusion of the Court of Appeals in this case. Indeed, if the opinion of the Court of Appeals in this case is correct the amendment was meaningless.

If, however, a right of redemption in the Government were deemed a condition precedent to the Government's consent to be sued in a quiet title action, subsection (e) (printed in Appendix A, p. 3) could be construed to provide such a right of redemption. The first sentence of that section deals with "judicial" sales of real and personal property. The second sentence uses the word "sale" without modification and apparently refers to both judicial and nonjudicial sales of either real or personal property. The third sentence, which grants the right to redeem within one year, uses the word "sale" without modification but is expressly limited to "a sale of real estate". The third sentence may be construed either as limited to "judicial sales", which are the subject of the first sentence, or, as the words read

independently seem to say, as a rule applicable to any kind of foreclosure sale of real property only:

The latter interpretation, i.e., that subsection (c) requires a right of redemption following a nonjudicial foreclosure sale, should be adopted *only* if such right is first determined to be a condition precedent to the right to sue the United States in a quiet title action. A construction of Section 2410, providing a right of redemption following a nonjudicial foreclosure is more reconcilable with Congressional intent than the lower court's construction denying absolutely the right to sue to quiet title, but is by no means necessary.

Point III—The Government's Consent to Be Sued in a Quiet Title Suit Was Not Intended to Be Conditioned on a Right of Redemption.

The consent of the United States to be sued in a quiet title suit pursuant to Section 2410 does not appear to have been intended by the Congress to be conditioned on any right of redemption. The provision for a right of redemption "where a sale of real estate is made to satisfy a prior lien" was contained in the original statute, by which consent to be sued in foreclosure suits against real estate was given, and the redemption provision was expressly limited to real estate. Act of Mar. 4, 1931, c. 515, 46 Stat. 1528. At the time when the redemption provision was enacted, there would have been no point in referring to quiet title actions because the United States had not then consented to be sued in that manner.

In 1942, the Congress extended the consent of the United States to authorize quiet title suits against real and personal property. Act of Dec. 2, 1942, c. 656, 56 Stat. 1026. The change was accomplished by amending subsection (a) of the present Section 2410. The right of redemption already provided by the third sentence of subsection (c) was

not changed by the amendment, nor referred to in subsection (a), although the first sentence of subsection (c) was amended at that time to include personal property which was then brought under coverage of subsection (a).

The language of subsection (c) cannot be construed to require a right of redemption with respect to personal property foreclosures. In conformity with logic and apparent Congressional intent, that language should not be construed to impose a condition upon the consent to be sued in quiet title action, which consent was granted by the same Act in the same manner as the consent to foreclose on personal property.

Well established rules of statutory construction support this conclusion. Prior to the 1942 amendment the right of redemption provided in subsection (c) was applicable only following court foreclosure sales. It was a proviso qualifying the consent to such suits, and a proviso refers only to the provision to which it is attached. *United States v. McClure*, 305 U.S. 472, 478. The effect of the proviso was not changed and the right of redemption was not enlarged by the 1942 amendment because "* * * a clause in a statute will be given no different meaning after an amendment than it had before, if the amendment relates to other matters and was obviously not designed to affect its meaning." *Barber v. Palo Verde etc. Co.*, 198 Cal. 649, 651, 246 Pac. 1944 (1926).

The Congress apparently recognized that the expeditious and normally used remedy of foreclosure, pursuant to a contractual power of sale ought not to be encumbered, nor the value of deeds of trust and mortgages impaired, by the imposition of a vague right of redemption. Protection of the Government's legitimate rights does not require it, and the courts should not impose it without a clear Congressional mandate.

CONCLUSION

Taxpayer had only defeasible rights to property in the land and chattels affected by this action when the taxes involved were assessed. Taxpayer's rights were subject to termination and it is not disputed that Taxpayer's rights were terminated. Although the United States still has tax liens on all property and rights to property of Taxpayer, Taxpayer has neither respecting the land and chattels affected by this action. It follows that the land and chattels passed to Bank as purchaser free and clear of any lien of the United States.

If the Congress intended to impose a right of redemption as a condition subsequent to effective foreclosure by the exercise of a power of sale, then 28 U.S.C. (1952 ed.) § 2410(c) may be so construed as to provide such a right of redemption.

It is the Bank's contention, however, that the judgment of the Court of Appeals should be reversed and the judgment of the District Court affirmed in all respects.

Dated: November 20, 1959.

Respectfully submitted,

SAMUEL P. STEWART
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(Appendix Follows)

Appendix A

Internal Revenue Code of 1939

§ 3670. Property Subject to Lien

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. 53 Stat. 448.

§ 3671. Period of Lien

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. 53 Stat. 449.

§ 3672. Validity Against Mortgagees, Pledgees, Purchasers, and Judgment Creditors

(a) Invalidity of lien without notice. Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) Under State or Territorial laws. In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or * * * [Remainder of section not material]

28 U.S.C. (1952 ed.) § 2410

§ 2410. Actions Affecting Property on Which United States Has Lien

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, [including the District Court for the Territory of Alaska,]* or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law

*Bracketed words deleted by Act of July 30, 1954, c.648, § 2(a), 68 Stat. 589.

of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien. As amended May 24 1949, c. 139, § 119, 63 Stat. 105.

No.
183
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SUPREME COURT, U. S.

FILED
JAN 15 1960
JAMES R. BROWNING, Clerk

No. 183

In the Supreme Court of the United States

OCTOBER TERM, 1959

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the Court of Appeals (R. 66–74, 76–78) are reported at 265 F. 2d 862.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1959. (R. 75.) A petition for rehearing was denied on May 1, 1959. (R. 76–78.) The petition for a writ of certiorari was filed on July 6, 1959, and was granted on October 12, 1959. (R. 79.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a junior federal tax lien may be extinguished through a non-judicial sale of the property by a mortgagee under a contractual power of sale.

STATUTES INVOLVED

Pertinent provisions of the Internal Revenue Codes of 1939 and 1954, and 28 U.S.C. 2410 are set forth in the Appendix, *infra*, pp. 21–27.

STATEMENT

On February 13, 1953, taxpayer Sierra Wood Products Corporation executed and delivered to petitioner bank, as security for certain promissory notes, a deed of trust on real property which it owned in California, and a chattel mortgage (R. 20–21, 66). A second chattel mortgage was given on April 9, 1953 (R. 21, 67). The deed of trust and the chattel mortgages were promptly and duly recorded (R. 21). Both the deed of trust and the mortgages authorized the bank to sell the mortgaged property in case of default (R. 31–32, 43–44, 51–52).

Thereafter, federal unemployment taxes were assessed against the taxpayer on November 18, 1953, February 24, 1954, and March 4, 1954, in the respective amounts of $5,309.77, $6,207.58, and $328.40. Notice of federal tax liens covering the first two assessments were filed in the appropriate county recorder's office on February 19, 1954, and April 5, 1954, respectively. Of the taxes assessed, there remain unpaid $11,493.56 plus statutory interest. (R. 5–7, 18–19, 22, 67.)

When taxpayer subsequently defaulted in paying the promissory notes, the bank foreclosed its mortgages (R. 22–23, 67). The properties were sold at public auction on March 15, 1956, in compliance with the procedures in the deed of trust and the chattel mortgages (*ibid.*). The bank purchased all the property (*ibid.*). No actual notice of the foreclosure sale was given to the United States (R. 23, 67).

After the sale, the bank instituted suit against the United States in a California state court seeking a decree that the foreclosure sale had removed the federal tax liens from the property. (R. 4–8.) On petition of the United States, the action was removed to the United States District Court for the Northern District of California, pursuant to 28 U.S.C. 2410 (Appendix, *infra*, p. 25). (R. 3–4.) Both the bank and the United States filed motions for summary judgment. The District Court granted the bank's motion and entered judgment decreeing that the United States had no liens against the property (R. 57–60, 67.)

The Court of Appeals for the Ninth Circuit unanimously reversed. The court held (R. 73–74) that "[o]nce the [federal tax] lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice. Rather, the Government's lien could be divested only in a manner prescribed by Congress." It pointed out (R. 74) that "[t]o hold for the [bank] would divest the United States of its interest in

property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien." It noted (R. 74) that the bank "is not without remedy," since it can institute an action under Section 7424 of the Internal Revenue Code of 1954 "to remove the [federal] lien," file an application with the District Director of Internal Revenue for an administrative discharge of the property from the lien, or bring a foreclosure action under 28 U.S.C. 2410, in which the United States would be joined.[1]

SUMMARY OF ARGUMENT

I

In the court of appeals, the United States contended that the district court had no jurisdiction under 28 U.S.C. 2410 to entertain this action to quiet title. The court of appeals rejected this contention and, after further consideration, the Government has decided not to press the point in this Court. However, since the question is not free from doubt, we have briefly set forth in the Argument the contentions that support, and those that militate against, the holding of jurisdiction.

II

The substantive issue in this case—whether a junior federal tax lien can be discharged through the sale of the property by a prior mortgagee under a power of sale contained in the mortgage—is sub-

[1] The court rejected the Government's contention that the district court had no jurisdiction over the suit (R. 67–70). See discussion *infra*, pp. 7–13.

stantially the same as in *United States* v. *Brosnan*, No. 137, this Term. Our brief in *Brosnan* fully develops the argument that federal tax liens may be discharged only in accordance with the specific and detailed procedures provided therefor by Congress; and that they cannot be discharged in state proceedings to which the United States is not a party, even though under state law such proceedings result in eliminating non-government junior liens. In this brief we discuss only the specific points that petitioner raises.

Petitioner foreclosed its first mortgage by selling the property pursuant to its power of sale in the mortgages. At that time, federal tax liens, admittedly junior to the mortgage, had attached to the property. Petitioner then instituted this action against the United States to quiet title under 28 U.S.C. 2410, on the theory that "the [federal] tax lien extinguished by the sale held under the power of sale in the trust deed and chattel mortgages * * *" (R. 70). The court of appeals held (R. 78) that "the sale under the power contained in the mortgages * * * [did not give] the purchaser a title free and clear of federal tax liens," since "a [federal] tax lien, even though junior to a mortgage * * * may be divested only with the consent of the United States and in the manner prescribed by Congress" (R. 76). The court further held that the bank could not clear its title under 28 U.S.C. 2410.

1. Petitioner apparently does not deny that when the federal liens were perfected, the taxpayer-mortgagor had an interest in the mortgaged property to

which the liens attached. It contends only that since under California law the foreclosure sale terminated the mortgagor's rights, it also divested the federal liens that had attached to the mortgagor's property. This is basically the same argument as in *Brosnan* (and subject to all of its infirmities) that because non-judicial state foreclosure procedures eliminate non-government junior liens, they also wipe out subordinate federal liens. It is immaterial whether the subordinate interest that state law eliminates through foreclosure is the lien of a junior creditor, or the remainder interest of the mortgagor. In either case, as we have shown in the *Brosnan* brief, the state procedures do not eliminate the federal lien, which may be discharged only in accordance with the federal statutory provisions therefor.

Petitioner's contention that the decision below treats it unfairly is without merit. For the United States recognizes that petitioner's prior claim must be fully satisfied before it is entitled to anything on its junior lien. Petitioner's argument is basically only the complaint that it is not permitted to retain any excess over the amount actually necessary fully to satisfy its claim against the mortgagor.

2. Petitioner's attack on the holding below that it could not clear its title pursuant to 28 U.S.C. 2410 misconceives the scope of that ruling. The court below did not hold that petitioner could not maintain this action to quiet title under Section 2410, but only that its title was not clear since the state foreclosure proceedings did not eliminate the federal liens. The

court further held that petitioner could not affirmatively clear its title in this proceeding, since a title may be cleared under Section 2410 only through foreclosure in a judicial action in which the United States would have one year to redeem. Since petitioner here merely sought a "declar[ation] and adjud[ication]" (R. 7) that the United States had no interest in the property, it failed to meet these requirements.

ARGUMENT

I

THE JURISDICTION OF THE DISTRICT COURT

In the court of appeals, the United States contended that the district court had no jurisdiction to entertain this action to quiet title. The court of appeals rejected the argument. Upon further consideration, the Government has decided not to press the point in this Court. However, since the question is not free from doubt, we shall indicate briefly the considerations that support the court of appeals' ruling, and also the contrary arguments.

This action was brought against the United States in a California state court under 28 U.S.C. 2410, to quiet title to property to which federal tax liens had attached. That Section provides that, under the conditions therein prescribed "for the protection of the United States", the latter

> may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal prop-

> erty on which the United States has or claims a mortgage or other lien.

It gives the United States the right to remove any such action instituted in a state court to the federal district court;[2] and provides that, where a sale of real estate is made to satisfy a lien prior to that of the United States, the latter "shall have one year from the date of sale within which to redeem." It further provides for the administrative extinguishment (by government officials) of "a [federal] junior lien, other than a tax lien," that attaches to real or personal property on which there is a prior "duly recorded" lien.

As originally enacted in 1931, Section 2410 applied only to foreclosure actions on realty, not to suits to quiet title. The House Committee Report on the bill pointed out (H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1–2) that the legislation has been recommended

> in order to relieve against the injustice with which mortgagees are confronted under the present state of the law who find, when it is necessary to foreclose their mortgages, that there has been filed against the property a junior lien by the Federal Government for some debt due the United States by the owner of the equity in the property, and for which the mortagee owes no obligation either legal or moral. In such circumstances the mortgagee finds himself at an impasse. It is impossible

---

[2] Pursuant to this provision, the United States removed this action to the district court. Whether that court had jurisdiction, however, depends on whether the state court initially had jurisdiction.

> for him to bring about a judicial sale of the property owing to the cloud upon the title created by the Government's lien. He can not remove the lien as there is no method by which he may bring the United States in as one of the parties to the foreclosure proceeding. He is, therefore, in effect defeated of his own right to foreclose unless he is willing to pay off the Government lien * * *.
>
> The purpose of this bill is to provide a simple and just method of proceeding in such cases, one which is fair to the holder of the prior lien on the real estate and which amply and fully protects the rights of the Federal Government. * * *

Section 2410 was amended in 1942 by the insertion of a phrase which extended the consent of the United States to be sued to "quiet title" actions in addition to foreclosure actions.[3] This change was made at the suggestion of Attorney General Jackson who, in a letter quoted by the Senate Committee (S. Rep. No. 1646, 77th Cong., 2d Sess., p. 2), stated that "under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien"; that "persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished," and that "mortgagees have foreclosed on property and have failed to join the United States"; and that "justice and fair dealing would require that a method

[3] The mortgage foreclosure provisions were also extended to cover mortgagees on personal property.

be provided to clear real-estate titles of questionable or valueless Government liens."

1. In terms, 28 U.S.C. 2410 supports the holding below that the district court had jurisdiction It authorizes the United States to be made a party "in *any* civil action or suit * * * to quiet title to * * * property on which the United States has or claims a mortgage *or other lien*" (emphasis added). There is no exception for actions in which the lien of the United States is a tax lien. Moreover, when Congress in 1931 wished to exclude tax liens from the reach of the provision, it did so in explicit terms. Subsection (d) (*infra*, p. 27), which deals with extinguishment of liens through administrative action by government officials, applies only to "a junior lien, *other than a tax lien*" (emphasis added). Had Congress in 1942 intended similarly to limit quiet title actions, it presumably would have similarly so stated. Finally, this case involves one of the specific situation that Attorney General Jackson described as within the scope of the 1942 amendment—"mortgagees [who] have foreclosed on property and have failed to join the United States."

2. However, when Congress stated at the time of the original enactment of Section 2410 in 1931 that no procedure was available for removal of a valueless federal lien "for some debt due the United States," there were already in existence well-established procedures under the Internal Revenue Code

for removal of federal tax liens.[4] These procedures were equally applicable in 1942 when the Attorney General stated that there was no method for clearing federal liens available to "mortgagees [who] have foreclosed on property and have failed to join the United States." In the circumstances, the argument against jurisdiction is that the actions "to quiet title to * * * property on which the United States has or claims a mortgage or other lien" covered by Section 2410 were not intended to cover all liens, but only those for which there was no other method of removal, *i.e.*, non-tax liens. In other words, Section 2410 was not intended to duplicate the existing procedures for discharging federal tax liens.[5]

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[4] Those procedures, first provided in the Revenue Act of 1924 (43 Stat. 253), included the discharge of the lien by the Secretary of the Treasury or his delegate when the liability is satisfied or has become unenforceable, or a proper bond is furnished (Section 6325 of the Internal Revenue Code of 1954, *infra*, p. 22); the institution of an action in the district court by the United States, either on its own motion or at the request of the holder of a prior lien on or interest in property subject to a tax lien, in which the court shall "finally determine the merits of all claims to and liens upon the property" (Section 7403, *infra*, pp. 23–24); and the filing by such private person, if the Secretary refuses his request to institute suit under Section 7403, of a district court action "for a final determination of all claims to or liens upon the property in question" (Section 7424, *infra*, pp. 24–25). See discussion of these provisions in the *Brosnan* brief, pp. 11–13.

[5] Certain practical considerations also tend to support this view. In the instant case, petitioner could have filed suit in the district court under Section 7424 of the Code (*infra*, pp. 24–25); in such suit there could have been "a final determination of all claims to or liens upon the property in question" (Section 7424). In the Section 2410 proceeding, however, the court merely determined that the federal liens were not discharged in the state foreclosure proceedings; in order to remove

But the fact that another method for discharging tax liens was already available under the Internal Revenue Code does not necessarily establish that Congress did not intend to "prescribe alternative remedies for removal of a federal tax lien" (R. 69). The two procedures are different in at least one significant respect: Under the Code, recourse may be had only to the district court, whereas under 28 U.S.C. 2410 the suit may be instituted in an appropriate state court. Congress might well have decided to implement the existing federal court procedure by adding the state court suit.

3. Another argument against jurisdiction is based on the fact, as the court of appeals correctly held (R. 68), that Section 2410 is not an affirmative grant of jurisdiction to the district or state courts, "but simply waives sovereign immunity from suit."[6] Thus, the words "any State court having jurisdiction of the subject matter" in Section 2410 may be read as referring not to jurisdiction of the general subject

---

petitioner will have to institute further proceedings. Quaere: is it likely that Congress intended to provide an alternative procedure which, if invoked, would not necessarily result in final settlement of the controversy?

[6] Accord: *Seattle Association of Credit Men* v. *United States*, 240 F. 2d 906, 908 (C.A. 9); *Wells* v. *Long*, 162 F. 2d 842, 844 (C.A. 9); *United States* v. *Cless*, 254 F. 2d 590 (C.A. 3); *Remis* v. *United States*, 172 F. Supp. 732 (D. Mass.), affirmed, C.A. 1, No. 5538, January 6, 1960; *Tompkins* v. *United States*, 172 F. Supp. 204 (S.D. Texas); *Peacock* v. *United States*, 175 F. Supp. 645 (D. Idaho); *Haldeman* v. *United States*, 93 F. Supp. 889 (E.D. Mich.); *Gerth* v. *United States*, 132 F. Supp. 894 (S.D. Calif.); *Vincent* v. *P. R. Matthews Co.*, 126 F. Supp. 102 (N.D.N.Y.). Cf. *Coson* v. *United States*, 169 F. Supp. 671, pending on appeal (C.A. 9).

matter of quiet-title actions, but rather to jurisdiction in the sense of the subject matter of the specific litigation. Since the state court did not have jurisdiction over this particular litigation absent the consent of the United States, it would follow that it had no jurisdiction under 28 U.S.C. 2410.

An equally plausible explanation, however, is that Congress referred to state courts "having jurisdiction of the subject matter" to make it clear that the United States was not consenting to be sued in a state court that otherwise would not have jurisdiction of a quiet-title action. Since, as the court of appeals held (R. 67–68), the local court in which this action was instituted had jurisdiction under the California constitution over such suits, under this view the jurisdictional prerequisites of 28 U.S.C. 2410 would be met.

II

THE FEDERAL TAX LIENS WERE NOT REMOVED BY THE NON-JUDICIAL SALE OF THE PROPERTY UNDER THE POWER OF SALE CONTAINED IN THE MORTGAGES

The substantive issue in this case—whether a junior federal tax lien can be extinguished through a sale of the property by a prior mortgagee under a contractual power of foreclosure and sale contained in the mortgage—is substantially the same as that in *United States* v. *Brosnan*, No. 137, this Term, in which we have previously filed our brief. The only difference between the cases is that in *Brosnan* the property was sold in execution of a confessed judgment, while here it was sold pursuant to a power of sale. In our opinion, that distinction has no significance.

For the governing principle in both cases is that federal tax liens may be removed only in accordance with the specific and detailed procedures provided therefor by Congress; and that they cannot be discharged pursuant to state proceedings to which the United States is not a party, even though such proceedings result in eliminating non-Government junior liens. The Government's arguments in support of this position are fully developed in the *Brosnan* brief, and we shall not repeat them here. Accordingly, we discuss only the specific points that petitioner raises.

Petitioner foreclosed its liens by selling the property pursuant to the power of sale contained in the deed of trust and mortgages. In so doing, it admittedly fully complied with the requirements of California law, and under that law other junior liens would thereby be eliminated. Petitioner then instituted the present suit under 28 U.S.C. 2410. It was designated an action to quiet title (R. 4), and sought an adjudication that the federal Government no longer has any "estate, lien, right, title or interest whatever" in the property involved (R. 7–8). The theory of the suit was that "the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished" (R. 70; see Pet. Br. 7).

The court of appeals held (R. 78) that "the sale under the power contained in the mortgages * * * [did not give] the purchaser a title free and clear

of federal tax liens," since "a [federal] tax lien, even though junior to a mortgage * * * may be divested only with the consent of the United States and in the manner prescribed by Congress" (R. 76). The court further held that the bank could not clear its title under 28 U.S.C. 2410 (R. 74), since that Section requires, as "a condition of the Government's consent to be sued in any foreclosure * * * [thereunder,] a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale" (R. 77).

We submit that the court of appeals correctly held that the federal tax liens were not divested through the non-judicial sale of the properties pursuant to the powers of sale contained in the deed of trust and chattel mortgages. For, as the court stated (R. 73–74), "once the [federal] lien attached to the property, the Government had a right in the property which * * * could be divested only in a manner prescribed by Congress."

1. Petitioner apparently does not deny that when the federal tax liens were perfected, the taxpayer (the mortgagor) had an interest in the mortgaged property to which those liens attached. It contends (Br. 5) only that under California law "a sale pursuant to a power of sale effectively terminates the defeasible rights of the trustor under a deed of trust or the mortgagor under a mortgage and incidentally all rights of any subordinate lienholder"; and that "[by] virtue of the foreclosure sale, the taxpayer no longer has either 'property' or 'rights to property' in the land and chattels affected by this action." In

other words, petitioner's argument is that a federal tax lien that validly attached to a property interest of the taxpayer may be wiped out under state foreclosure procedures because, as against non-Government junior liens, the mortgagor's existing interest is eliminated by foreclosure of the mortgage under a power of sale.[1]

This argument is basically the same, and is subject to the same infirmities, as the argument in *Brosnan* that because non-judicial state foreclosure proceedings eliminate non-Government junior liens, they also wipe out subordinate federal tax liens. For it is immaterial whether the subordinate interest that state law eliminates through foreclosure is the lien of a junior creditor, or the remainder interest of a mortgagor. In either case, as we have shown in the *Brosnan* brief, the state procedures do not eliminate

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[1] Under California law, a mortgage creates only a security interest in, and does not pass title to, the mortgagee. *Schriber* v. *Alameda County-East Bay Title Ins. Co.*, 156 Cal. App. 2d 700, 320 P. 2d 82; *Power & Irrigation Co.* v. *Capay Ditch Co.*, 226 Fed. 634 (C.A. 9); Section 744, California Code of Civil Procedure, 17 West's Annotated Codes; Sections 2888 and 2924, California Civil Code, 11 West's Annotated California Codes.

A trust deed of the kind here involved "is in effect only a mortgage with a power of sale." 17 Calif. Juris., *Mortgages*, §§ 25, 542. The mortgagee's power to sell under a trust deed conveys no estate in the land. *Id.*, § 543. A junior mortagee has the right to redeem, and must be made a party to the foreclosure sale in order to remove his lien. *Id.*, §§ 568, 609. Where, as here, the mortgagee himself purchases the property at the sale, the mortgagor has the right to redeem. *Id.*, §§ 550, 554. See *Creditors' Remedies: Statutory Right of Redemption from Execution and Foreclosure Sales in California*, 45 Calif. L. Rev. 191.

the federal lien, which may be discharged only in accordance with the federal statutory provisions therefor. Petitioner's argument (Br. 4, 5) that California law treats the mortgagor's interest as "defeasible" is but another way of stating that under California law a mortgage foreclosure pursuant to a power of sale wipes out junior interests, including that of the mortgagor. But it does not similarly wipe out an existing federal tax lien.

Petitioner attempts (Br. 6) to analogize a junior lien on property that is subject to a prior mortgage to a lien upon a lease or an option, which ends when the lease terminates or the option expires. But in the latter cases, the property that is the subject of the lien itself ceases to exist after termination or expiration; the lien, therefore, necessarily expires along with the property. Here, however, it is the security interest that terminates upon foreclosure, and the underlying property subject to the mortgage remains unchanged. Since that property is subject to the second lien of the United States at the time of foreclosure, it continues subject to it after foreclosure unless the latter wipes it out. As we have shown, the state foreclosure proceedings do not have that effect.

Petitioner argues (Br. 8–9) that the decision below treats it unfairly. It contends (*ibid.*) that Congress "undertook to protect" its "deed of trust and chattel mortgages" in Section 3672 of the Internal Revenue Code of 1939, which provides that federal tax liens are not valid as against mortgagees, pledgees, purchasers or judgment creditors until they have been filed; and that the effect of the decision below is that its security position is "partially invalidated." But petitioner cannot claim any unfairness because the

junior federal liens are not discharged in the state foreclosure proceeding. For the United States has no claim against the mortgaged property unless petitioner's prior claims are fully satisfied, and once those claims are satisfied, petitioner has received the full measure to which it is entitled.

Section 3672 was designed to insure that the interests therein given protection would not be subordinated to a prior federal tax lien, the existence of which they could not ascertain when their own interest was created. It was obviously not intended to protect the tenuous interest that the mortgagee here relies on: the claim that "foreclosure by power of sale" is "the most expeditious and economical means of realizing on its security" (Pet. Br. 9). Petitioner's argument is basically only the complaint that it is not permitted to retain any excess over the amount necessary fully to satisfy its claims against the mortgagor.

Petitioner's complaint (Br. 9) that the decision below "gives to the Government greater rights than Taxpayer itself had" rests on the misconception that because federal tax liens attach only to property of the taxpayer, the United States, in asserting such liens, stands in the taxpayer's shoes. For if the rights of the United States did not rise higher than those of the taxpayer, the federal tax lien would never have priority. See Anderson, *Federal Tax Liens—Their Nature and Priority*, 41 Calif. L. Rev. 241, 250-252. Cf. *United States* v. *Bess*, 357 U.S. 51, where the Court held that federal tax liens attached to the cash surrender value of life insurance policies held by the decedent taxpayer at the time of his death, even though he had not exercised the right to surrender them.

2. Petitioner also challenges (Br. 10–13) the ruling below that it could not clear its title pursuant to 28 U.S.C. 2410. But petitioner misconceives the scope of that ruling. The court below did not hold, as petitioner states (Br. 10), that it could not maintain an action under that Section. Rather, the court ruled that the Section 2410 action would lie, but that petitioner was not entitled to a determination that the Government had no interest in the property, since the state foreclosure proceedings did not, in fact, wipe out the federal liens. The court further held that the bank could not eliminate the liens in the Section 2410 proceeding.[8] It pointed out (R. 74) that "in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption"; and it concluded (*ibid.*) that petitioner could not "do indirectly what it could not do directly," *i.e.*, eliminate the federal liens without giving the United States the rights upon which it had conditioned its consent to be sued under Section 2410. Here petitioner's complaint met neither of these conditions (foreclosure in a judicial action, and the right to redeem within one year), but merely sought a "declar[ation] and adjud[ication]" (R. 7) that the United States had no interest in the property involved.

[8] The court below may also have relied upon the provisions of Section 2410 in reaching its conclusion that the state foreclosure proceedings did not wipe out the federal liens. As we pointed out in our *Brosnan* brief (pp. 11–26), the lien discharge provisions of Section 2410 are one of the methods provided by Congress for the removal of federal liens and, together with the specific lien-removal procedures of the Internal Revenue Code, indicate that Congress intended the federal provisions to be the exclusive method for extinguishing federal liens.

Accordingly, the court of appeals correctly ruled that the federal liens could not be eliminated in this proceeding, but only by following the procedures specifically designated for that purpose by Congress. And, as the court pointed out (R. 74), petitioner "is not without remedy," since it can now still invoke several of those procedures.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1960.

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*The court stated (R. 74) that petitioner, in addition to proceeding under the Internal Revenue Code, "can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410." Since petitioner has already foreclosed its mortgage under state law (albeit without discharging the federal tax lien), it is difficult to see how it could now maintain a foreclosure action, unless (1) the failure to discharge the junior federal lien means that no foreclosure has taken place, or (2) petitioner can still maintain an action to foreclose the federal lien. Moreover, insofar as the real property is concerned, it appears that petitioner could not foreclose. Under California law the holder of a deed of trust with a power of sale (unlike a mortgagee) cannot institute foreclosure proceedings; it can realize on its security only by exercising the power of sale. 17 Calif. Juris., *Mortgages*, Sec. 25.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed., Sec. 3671.)

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * * *

(26 U.S.C. 1952 ed., Sec. 3672.)

Internal Revenue Code of 1954:

SEC. 6325. RELEASE OF LIEN OR PARTIAL DISCHARGE OF PROPERTY.

(a) *Release of Lien.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of release of any lien imposed with respect to any internal revenue tax if—

(1) *Liability satisfied or unenforceable.*—The Secretary or his delegate finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied, has become legally unenforceable, or, in the case of the estate tax imposed by chapter 11 or the gift tax imposed by chapter 12, has been fully satisfied or provided for; or

(2) *Bond accepted.*—There is furnished to the Secretary or his delegate and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified by such rules or regulations.

(b) *Partial Discharge of Property.*—

(1) *Property double the amount of the liability.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to any lien imposed under this chapter if the Secretary or his delegate finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the unsatisfied liability secured by such lien and the amount of all other liens upon such property which have priority to such lien.

(2) *Part payment or interest of United States valueless.*—Subject to such rules or regulations as the Secretary or his delegate may prescribe, the Secretary or his delegate may issue a certificate of discharge of any part of the property subject to the lien if—

(A) there is paid over to the Secretary or his delegate in part satisfaction of the liability secured by the lien an amount determined by the Secretary or his delegate, which shall not be less than the value, as determined by the Secretary or his delegate, of the interest of the United States in the part to be so discharged, or

(B) the Secretary or his delegate determines at any time that the interest of the United States in the part to be so discharged has no value.

In determining the value of the interest of the United States in the part to be so discharged, the Secretary or his delegate shall give consideration to the fair market value of such part and to such liens thereon as have priority to the lien of the United States.

(c) *Effect of Certificate of Release or Partial Discharge.*—A certificate of release or of partial discharge issued under this section shall be held conclusive that the lien upon the property covered by the certificate is extinguished.

* * * * *

(26 U.S.C. 1952 ed., Supp. V, Sec. 6325.)

SEC. 7403. ACTION TO ENFORCE LIEN OR TO SUBJECT PROPERTY TO PAYMENT OF TAX.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United

States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property and in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States.

(d) *Receivership.*—In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary or his delegate during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

(26 U.S.C. Sec. 7403.)

SEC. 7424. CIVIL ACTION TO CLEAR TITLE TO PROPERTY.

(a) *Obtaining Leave to File—*

(1) *Request for institution of proceedings by United States.*—Any person having a lien upon or any interest in the property referred to in section 7403, notice of which has been duly filed of record in the jurisdiction in which the property is located, prior to the filing of notice of the lien of the United States as provided in section 6323, or any person purchasing the

property at a sale to satisfy such prior lien or interest, may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in section 7403.

(2) *Petition to court.*—If the Secretary or his delegate fails to authorize the filing of such civil action within 6 months after receipt of such written request, such person or purchaser may, after giving notice to the Secretary or his delegate, file a petition in the district court of the United States for the district in which the property is located, praying leave to file a civil action for a final determination of all claims to or liens upon the property in question.

(3) *Court order.*—After a full hearing in open court, the district court may in its discretion enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

(b) *Adjudication.*—Upon the filing of such civil action, the district court shall proceed to adjudicate the matters involved therein, in the same manner as in the case of civil actions filed under section 7403. For the purpose of such adjudication, the assessment of the tax upon which the lien of the United States is based shall be conclusively presumed to be valid.

(c) *Costs.*—All costs of the proceedings on the petition and the civil action shall be borne by the person filing the civil action.

(26 U.S.C., Sec. 7424.)

28 U.S.C.:

§ 2410 [As amended by Sec. 119, Act of May 24, 1949, c. 139, 63 Stat. 89, 105, and Section 12(h), Act of July 7, 1958, 72 Stat. 339, 348]. *Actions affecting property on which United States has lien.*

(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United

States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any

case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises, to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien.

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No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner's Reply Brief

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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I, KENNETH M. JOHNSON, one of the attorneys for BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of February, 1960, I served copies of the attached Petitioner's Reply Brief on the several parties as follows:

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by mailing four copies to the Solicitor General and four copies to the Assistant Attorney General by enclosing said copies in envelopes addressed as indicated above with airmail postage prepaid and by mailing a copy to the United States Attorney enclosed in an envelope addressed as indicated above with first-class postage prepaid.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioner's Reply Brief

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

POINT 1—The Basic Issue Is: To What "Property" Did the Government's Lien Attach?

Throughout its brief, the Government has used the term "property" indiscriminately, referring sometimes to the land and chattels (e.g., Br. pp. 6, 13, 14, 17) and sometimes to the defeasible interest of Taxpayer in the land and chattels (e.g., Br. pp. 5, 15, 17). The Government fails completely to answer Bank's basic argument that Taxpayer did not have any "property or rights to property" in the land and chattels after the foreclosure sales.

The Government is correct in stating Taxpayer "had an *interest*" in the land and chattels when its lien attached (Br. pp. 4, 15). The Government is wrong in assuming that the lien attached to the land and chattels (Br. pp. 16, 17). The lien attached only to Taxpayer's interest. The Government's insistence that its tax lien had to be "extinguished" or "wiped out" (Br. pp. 2, 4, 8, 14, 15, 17) is thus based upon a wholly unsound premise. The Government also speaks of "other junior liens" being eliminated by foreclosure (e.g., Br. p. 14). Actually, it is the trustor's right to a reconveyance of the land, upon payment of his debt, that is eliminated.

Bank's argument is not "that a *federal tax lien* that validly attached to a property interest of the taxpayer may be wiped out under state foreclosure procedures * * *" as the Government states (Br. p. 16). Bank's argument is that the *property interest* of Taxpayer was terminated by the foreclosure sales, although the federal tax lien remains fully effective as to any property and rights to property which Taxpayer continues to own. Of course the practical result is the same. But the Government here is not seeking a practical result. It is urging an exceedingly strained construction of its statutory rights, one which has no regard for costs or financial hardships to prior creditors and is unsupported by evidence of practical benefit to the Government.

The Government undertakes to distinguish a lien on the interests of a lessee or option holder (Br. p. 17), but the distinction is invalid. The Government concedes its lien on a lease or option interest *necessarily* expires when the lease or option expires because "the subject of the lien itself ceases to exist." Yet it asserts its lien on the interest of a trustor is not affected by foreclosure because "the

property" in which Taxpayer had an interest "remains unchanged."

Obviously land or chattels on which a lease or option has expired remain as unchanged as do land or chattels on which a mortgage or deed of trust has been foreclosed. It is the taxpayer's interest which disappears in both cases. The Government's lien attaches only to the taxpayer's interest in either case.

(a) No "excess proceeds" are in issue in this case. The suggestion that there were "excess proceeds" is unsupported by the record.

The Government introduces additional confusion by asserting that Bank's complaint is only "that it is not permitted to retain any excess over the amount actually necessary fully to satisfy its claim against the mortgagor" (Br. pp. 6, 18). This assertion is untrue. It is unsupported by the record in any way. The land and chattels affected by this action are described in detail (R. pp. 9-18). Bank sued to quiet title to the land and chattels as a purchaser at foreclosure sales. The proceeds of the foreclosure sales are not involved. Bank has never claimed any excess proceeds. The Government has not previously suggested that excess proceeds were realized at the foreclosure sales. The record does not indicate that any excess proceeds were realized.

(b) The issue here is not whether Bank could have proceeded in another way, but whether the statutes authorized the procedure followed.

On page 20, footnote 9 suggests that Bank could not now sue to foreclose; and, indeed, that it never could have. If this suggestion were correct it would hardly advance the Government's argument. In the interest of accuracy, however, we note that the law is to the contrary on both points of footnote 9. *Bank of America v. United States*, 84 F. Supp. 387 (S.D. Cal. 1949), permitted maintenance of an action

to foreclose a federal tax lien after a power of sale foreclosure proceeding had been completed. As to that portion of the note stating that a deed of trust with a power of sale may not be foreclosed in a court proceeding the law is clearly to the contrary. California Code of Civil Procedure Section 725a provides:

> "The beneficiary or trustee named in a deed of trust * * * upon real property or any interest therein to secure a debt or other obligation * * * shall have the right to bring suit to foreclose the same * * *."

This suit is here not because it would have been *impossible* for Bank to proceed in any other way, but because the requirements of reasonable efficiency and economy in the conduct of American business require the use of the most efficient and economical procedures for enforcement of legal rights. The Congress in 1942 expressly authorized the procedure here used, as pointed out in our main brief (pp. 10-12). The availability of an archaic, cumbersome, wastefully expensive and dilatory alternative procedure is no reason for ignoring that statutory amendment.

POINT 2—The Interest of the United States Is No Greater Than Taxpayer's Was When the Lien Attached.

The Government takes the absurd position that its rights rise higher than those of Taxpayer (Br. p. 18).

Although our opening brief deals with this point (pp. 4, 5) some additional comment seems appropriate in view of the Government's statement.

The lien which the United States asserts reached only "property and rights to property * * * *belonging to*" Taxpayer. Internal Revenue Code of 1939, § 3670 (28 U.S.C. 1952 ed., § 3670).

The limitation upon the Government's interest is made clear by the provisions for enforcement by distraint on a taxpayer's property. Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.) Sections 3690 through 3697 provide for the enforcement of tax liens by distraint on personal property. Distraint on real estate is provided in Sections 3700 through 3706. The levy under Section 3692 is "upon all property and rights to property" except those exempted by Section 3691. The end result of distraint proceedings on personal property is a certificate of sale which "Shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold; * * *." Section 3697(b). Distraint on real estate results in a certificate of purchase at the time of sale and, after a one-year redemption period, a deed upon the surrender of the certificate. Section 3704 (c)(2) provides "* * *such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto."

It seems self-evident that the Government's tax lien reaches the same "property and rights to property" whether the Government chooses to foreclose by an action or by distraint proceedings. If the Government had foreclosed by distraint on the real estate and chattels affected by this action, thereby vesting "all property and rights to property" of Taxpayer in a purchaser, clearly Bank could thereafter foreclose its deed of trust and chattel mortgages by exercising its powers of sale. *Mansfield v. Excelsior Refining Co.*, 135 U.S. 326.

Can it be reasonably argued that the Government's tax lien reaches "property and rights to property" of a taxpayer that are not vested in a purchaser by a distraint sale? The

Government actually makes such an argument when it suggests (Br. p. 18) that the rights of the United States do rise higher than those of a taxpayer.

The *Mansfield* case, however, gave a negative answer. It decided in favor of Mansfield whose title was claimed by virtue of a purchase under a deed of trust power of sale. It decided against Excelsior whose title was claimed by virtue of a purchase at a distraint sale conducted under statutes similar to those cited above. The deed of trust was subject to (1) a lease (expired) to the taxpayer (a delinquent distiller) and (2) a "waiver" which gave the United States a first lien (not foreclosed). This Court stated at page 339:

> "We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the statute, (§ 3194,) transfers to the purchaser the right, title and interest of the *delinquent* in the property sold. When he sells real estate for taxes, the statute, in terms equally explicit, (§ 3199,) declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title and interest the *party delinquent* had in the real estate so sold."

Cases in which a taxpayer holds a fee at the time the lien of the Government attaches are clearly distinguishable. *Blacklock v. United States*, 208 U.S. 75, 88-89. There, this Court clearly spelled out the difference between the Government's right in distraint proceedings to dispose of the whole fee where the taxpayer owned an unencumbered fee, as he did in the *Blacklock* case, and its limited right to dispose of only a leasehold interest where that was all the taxpayer owned, as in the *Mansfield* case.

In *United States v. Kaufman*, 267 U.S. 408, 414, on the issue whether a lien for taxes of a partner reached partnership assets, this Court held that "under its very terms the lien includes only the property of the person owing the tax; and in the case of a partner owing an individual tax, it extends only to his interest in the surplus of the partnership property."

United States v. Bess, 357 U.S. 51, does not support the Government's contention. The decedent taxpayer had an unquestioned right at the time of his death to the cash surrender value of the insurance policies involved. The tax lien attached before his death. This Court held that part of the proceeds involved represented the cash surrender value. The Government's demand for a greater interest than the taxpayer had (the proceeds in excess of cash surrender value) was denied.

The Government's contention that a policy of uniformity in federal tax law (Brosnan Br. p. 26) prohibits foreclosure under power of sale is without merit.

When the Congress imposed a lien on the property of delinquent taxpayers "it took for granted * * * as it normally does in the tax law, the vital existence of state laws creating and maintaining various interests." *Fidelity & Deposit Co. v. New York City Housing Auth.*, 241 F.2d 142, 144 (C.A. 2d 1957). Uniformity of federal tax lien law does not require the property law of every state to be the same as every other state; rather Congress has created a lien which reaches the interest of a delinquent taxpayer, whatever that interest may be, but without increasing or decreasing that interest.

In *R.F.C. v. Beaver County*, 328 U.S. 204, the issue was whether real property taxes could be assessed on heavy machinery owned by a government corporation but leased

as part of a plant to a private corporation by a lease providing the machinery should remain personalty. A federal statute authorized such taxation of "real property." The Government contended uniformity required that "real property" be construed to mean what is generally regarded as real property. This Court rejected the Government's uniformity argument, stating at page 210:

> "We think the congressional purpose can best be accomplished by application of settled state rules as to what constitutes 'real property,' so long as it is plain, as it is here, that the state rules *do not effect a discrimination against the Government*, or patently run counter to the terms of the Act. Concepts of real property are deeply rooted in state traditions, customs, habits, and laws. Local tax administration is geared to those concepts. To permit the States to tax, and yet to require them to alter their long-standing practice of assessments and collections, would create the kind of confusion and resultant hampering of local tax machinery which we are certain Congress did not intend." (Emphasis added.)

In the *Estate of Spiegel v. Commissioner*, 335 U.S. 701, this Court accepted the determination of the lower court that under state law the settlor of a trust had a right of reverter, with the result that the value of the corpus of the trust at the settlor's death was held includable in his gross estate for purposes of federal estate tax. It is certainly implicit in the opinion that if under state law the decedent had no possibility of reverter the corpus of the trust would not have been includable in the gross estate for federal estate tax purposes, with the resulting diminution of federal estate tax.

Similarly in *Poe v. Seaborn*, 282 U.S. 101, this Court held state community property law applicable to permit a husband and wife to file separate income tax returns, each

for one-half of the husband's income, resulting in a reduced federal income tax.

POINT 3—The District Court Had Derivative Jurisdiction on Removal.

The Government's position on the question of jurisdiction is ambiguous. The Government failed to file any cross-petition for certiorari and did not mention the question of jurisdiction in its memorandum filed in response to Bank's petition. Indeed, the Government says it "has decided not to press the point in this Court" (Br. pp. 4, 7). Yet, the Government presents arguments on this question (Br. pp. 4, 7-13). As we are in doubt whether the Government is presenting the point, the following comment seems necessary.

The Superior Court of the State of California is a court of general jurisdiction and has jurisdiction of actions to quiet title. This is conceded by the Government (Br. p. 13). Jurisdiction is established by Cal. Const. Art. VI, Sec. 5.

The United States has waived its sovereign immunity in all actions "to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien" subject only to its right to remove such actions as are commenced in a state court to the appropriate United States district court. 28 U.S.C. § 2410; *United States v. Morrison*, 247 F.2d 285, 290 (C.A. 5th 1957).

The jurisdiction of a district court upon removal is derivative. *Petroleum Carrier Corporation v. Carter*, 233 F.2d 402, 404 (C.A. 5th 1956); *United States v. Anglin & Stevenson*, 145 F.2d 622, 627 (C.A. 10th 1944) cert. denied 324 U.S. 844; *Pendleton v. Bussey*, 30 F.Supp. 211, 213 (W.D. Va. 1939); *United States v. Mid-Continent Petroleum Corporation*, 67 F.2d 37, 42 (C.C.A. 10th 1933).

The Government's concession (Br., p. 10) that 28 U.S.C. § 2410 in terms supports the holding that the District Court had jurisdiction seems a complete answer to the other arguments urged by the Government. "In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is of course to the literal meaning of words employed." *Flora v. United States*, 357 U.S. 63, 65.

The Government's conclusion (Br. pp. 10-11) that Section 2410 might not have been intended to extend to actions affecting tax liens results from an inaccurate reading of H. Rep. No. 95, 71st Cong., 2d Sess., pp. 1 and 2, and S. Rep. No. 4646, 77th Cong., 2d Sess. The House report does not say *no procedure* was then available; rather, it says a mortgagee could not bring about a *judicial* sale and that "there is no method" by which the United States may be made a party to a foreclosure action.

Similarly, the statement in S. Rep. No. 1646, that there is no provision whereby the owner of real estate may clear his title, can only have reference to quiet title actions. It may not be construed as saying *no procedure* was available because the very section which it was proposed to amend already permitted clearing of titles to real estate by joining the United States as a defendant in a foreclosure action.

That Congress intended Section 2410 to reach all liens of the Government, including tax liens, was reaffirmed in the enactment of Internal Revenue Codes of 1939, § 3680 (26 U.S.C. 1952 ed. § 3680) and Internal Revenue Code of 1954, § 7425 (26 U.S.C. § 7425). Both sections expressly refer to what is now 28 U.S.C. § 2410 as permitting actions against the United States.

Section 2410 waives sovereign immunity and permits actions against the Government only in courts having juris-

diction of the subject matter. If, as the Government argues (Br., pp. 12-13), jurisdiction of subject matter is dependent on consent of the Government to be sued, then the enactment of Section 2410 accomplished nothing. Under the construction suggested by the Government a court would not have jurisdiction before enactment of Section 2410 because the Government had not consented to be sued. It would not have jurisdiction after the enactment of Section 2410 because the consent to be sued is conditioned on pre-existing jurisdiction of the subject matter.

CONCLUSION

The land and chattels affected by this action passed to Bank free and clear of any lien of the United States. Accordingly the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

Dated: February 19, 1960

Respectfully submitted,

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No.

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In the Supreme Court of the United States

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Petitioner's Supplemental Memorandum

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Following are additional authorities illustrating the variety of situations in which the principle (Pet. Br. 5) has been applied that state law determines the extent of taxpayer's property:

United States v. Winnett, 165 F.2d 149, 151 (C.A. 9th, 1947);

United States v. Flood, 247 F.2d 209 (C.A. 1st, 1957);

Raffaele v. Granger, 196 F.2d 620, 623 (C.A. 3d, 1952);

Minnesota Mut. Life Ins. Co. v. United States, 47 F. 2d 942 (N.D. Tex., 1931).

Following are additional authorities clarifying the nature of a transfer of title by a deed of trust under California law:

Bank of Italy National Trust and Savings Association v. Bentley, 217 Cal. 644, 654, 656, 20 P.2d 940 (1933), *cert. den.* 290 U.S. 659;

Higley v. City of Sacramento, 149 F. Supp. 118, 121 (N.D. Cal., 1957).

Following are additional authorities illustrating the variety of situations in which federal tax liens have been held ineffective to seize rights greater than those owned by the taxpayer:

Reiter v. Kille, 143 F. Supp. 590 (E.D. Pa., 1956);

United States v. Dickerson, 101 F. Supp. 262 (E.D. Mo., 1951);

See aso:

Jackson v. Lawrence, 117 U.S. 679, 682;

Scott v. Paisley, 271 U.S. 632, 635.

Dated: March 18, 1960.

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